TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. [illegible]

HENRY S. DEXTER, PLAINTIFF IN ERROR,

vs.

MARY K. HALL ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED JANUARY 6, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 396.

HENRY S. DEXTER, PLAINTIFF IN ERROR,

vs.

MARY K. HALL ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	a	1
Summons	1	2
Complaint	4	3
Petition and order	11	5
Demurrer	8	4
Demurrer withdrawn	13	6
Answer	15	6
Verdict	35	12
Judgment	37	13
Clerk's certificate	41	14
Bill of exceptions	43	14
Citation	102	43
Clerk's certificate	103	43

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the Circuit Court of the United States for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between Mary K. Hall and others, and Henry S. Dexter and others, defendants, a manifest error hath happened, to the great damage of the said defendant Dexter, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at said Supreme Court of the United States at Washington on the first Monday of December next, in the said U. S. Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said U. S. Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this eighteenth day of May, A. D. 1867, and of the independence of the United States the ninety-second.

[SEAL.] GEO. E. WHITING, *Clerk.*

J. P. HOGE & SOL. A. SHARP,
Att'ys for Pl'ffs in Error.

The above writ of error is hereby allowed.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

The answer of the judge of the Circuit Court of the United States for the district of California.

The record and proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States within mentioned, at the day and place within named in a certain schedule to this writ annexed, as we are within commanded. The annexed schedule is a copy of the record, &c., to judgment, and of the bill of exceptions and citation, all of which are on file in our said court.

By the court:

[SEAL.] GEO. E. WHITING, *Clerk.*

Endorsed: 207. United States Circuit Court, dist. of Cal. Mary K. Hall *et als.*, pl'ffs, *vs.* Adolph Unger *et als.*, def'ts. Writ of error. Filed 8 Nov'b'r, 1867. Geo. E. Whiting, clerk. J. P. Hoge & Sol. A. Sharp, att'ys for pl'ffs in error.

1 UNITED STATES OF AMERICA:

In the Circuit Court of the United States in and for the northern district of California.

Summons.

MARY K. HALL *et al.*, plaintiffs, by P. G. Galpin, guardian,
vs.
ADOLPH UNGER *et al.*, defendants.

Action brought in the said Circuit Court, and the complaint filed in the city and county of San Francisco, in the office of the clerk of said Circuit Court.

The President of the United States of America, greeting:

To Adolph Unger, A. H. Houston, Robert Sherwood, Henry S. Dexter, Henry Nelson, Lawrence Duncan, C. Blackman, C. D. Taylor, Lewis Cutting, Francis Cutting, Frederick Smith, William H. Hooper, Numa Duperee, John Roe, Richard Roe, [Richard Roe,] Andrew D. Morrison, Edward Burr, and Benjamin D. Dean, trustees:

You are hereby required to appear in an action brought
2 against you by the above-named plaintiff, in the Circuit Court of the United States for the northern district of California, and to file your plea, answer, or demurrer to the complaint filed therein, a copy of which accompanies this summons, in the office of the clerk of said court, in the city and county of San Francisco, within ten days, exclusive of Sundays and day of service, after the service on you of this summons, if served in this county, or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to recover the possession of one hundred vara lot of land, situated in the city and county of San Francisco, State of California, district aforesaid, and numbered eighty-nine on the official map of said city of San Francisco, together with damages and mesne profits in the sum of $40,000 and costs, and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 4th day of
3 April, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the ninetieth.

[SEAL.] GEO. C. GORHAM, *Clerk.*
By S. NEALL, *D. C.*

[Int. rev. stamp, 50c., canc.]

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the wit hin summons on the 14th day of February, A. D. 1867, and personally served the same on the

14th day of February, A. D. 1867, by delivering to J. A. Hooper, as Richard Roe, said defendant, personally, in the county of San Francisco, a copy of said summons attached to a certified copy of the complaint.

SAN FRANCISCO, *February* 15, '67.

CHARLES W. RAND,
U. S. Marshal.
P'r A. TAYLOR, *Deputy.*

Endorsed: Filed February 15, '67.

G. C. GORHAM, *Cl'k.*
P'r JOHN O. WHEELER, *Dy.*

In the Circuit Court of the United States for the northern district of California.

4 *Complaint.*

MARY K. HALL, J. JUDSON HALL, MARY K. HALL, (the younger,) Hettie W. Hall, and Jane H. Hall, (a minor, by Philip G. Galpin, her guardian *ad litem,*) plaintiffs,
vs.
HENRY S. DEXTER, HENRY NELSON, LAWRENCE Duncan, C. Blackman, C. D. Taylor, Lewis Cutting, Francis Cutting, Frederick Smith, John Doe, Richard Roe, Andrew Edward Burr, and Benjamin D. Dean, Trustees, &c., defendants. } At Common Law.

The plaintiffs, Mary K. Hall, J. Judson Hall, Mary K. Hall, (the younger,) and Hettie W. Hall, appearing by Philip G. Galpin, their attorney, and the infant Jane H. Hall, appearing by Philip G. Galpin, her guardian *ad litem*, complain of the defendants, Adolph Unger, A. H. Houston, Robert Sherwood, Henry S. Dexter, Henry Nelson, Lawrence Duncan, C. Blackman, C. D. Taylor, Lewis Cutting, Francis Cutting, Frederick Smith, William H. Hooper,
5 Numa Dupereu, John Doe, Richard Roe, Andrew D. Morrison, Edward Burr, and Benjamin D. Dean, trustees, &c., and allege—

That all the plaintiffs are residents in, and citizens of, the State of Pennsylvania, and the plaintiff, Jane H. Hall, is under eighteen years of age.

That all of the defendants are residents in, and citizens of, the State of California.

That on the thirtieth day of September, 1860, the plaintiffs were seized and held, and owned in fee-simple, absolute, that certain parcel of land on the northerly side of Bryant street, in the city and county of San Francisco, known as original one hundred vara lot, number eighty-nine on the official map of said city and county, commencing at a point on the northerly side of Bryant street, distant, westerly from the westerly side of First street, two hundred and

seventy-five feet; running thence westerly, along said northerly line of Bryant street, two hundred and seventy-five feet; thence northerly, at right angles, two hundred and seventy-five feet; thence easterly, at right angles, two hundred and seventy-five feet; thence southerly, at right angles, two hundred and seventy-five feet,
6 to the point of beginning; and that said premises are of the value of over ten thousand dollars.

That afterwards, and while said plaintiffs were so seized and possessed of said premises as aforesaid, on the first day of October, 1860, or thereabouts, the defendants entered upon said premises, and ousted and ejected the plaintiffs therefrom, and unlawfully withheld, and still withhold, from the plaintiffs the possession thereof, to the damage of the plaintiffs in the sum of one thousand dollars.

The plaintiffs further allege, that on the said thirtieth day of September, 1860, they were seized and possessed, and since then hitherto have been so seized of said premises, known as original one hundred vara lot, number eighty-nine on the official map of said city and county of San Francisco; and while they were so seized and possessed, the said defendants entered and expelled the plaintiffs therefrom on said first day of October, 1860, and thence hitherto have kept the plaintiffs amoved and expelled therefrom; and from said last-mentioned date to the present time, have taken and received to the use of them, the said defendants, the rents, issues, and profits of the aforesaid premises, which were and are of the value of
7 five hundred dollars per month, whereby the plaintiffs have been damaged to the amount of forty thousand dollars.

Wherefore the plaintiffs pray judgment, that said defendants do forthwith deliver up to the plaintiffs the possession of said premises hereinbefore described, and every portion thereof, and for judgment for damages and mesne profits in the sum of forty thousand dollars, together with the costs of this action.

Dated San Francisco, March 15, 1866.

PHILIP G. GALPIN.

We hereby consent that this copy shall stand as the original complaint herein, the original complaint being lost.

HALL McALLISTER,
Attorney for Plaintiffs.
HOGE & SHARP,
For Defend'ts.

A true copy.
Attest:
[SEAL.] SAM'L NEAL, *D. C.*

8 In the Circuit Court of the United States in and for the northern district of California.

Petition and order.

The petition of Philip G. Galpin, respectfully shows to the court that he is the attorney of Mary K. Hall, J. Judson Hall, Mary K.

Hall, (the younger,) and Hettie W. Hall, all of whom are the heirs of John Hall, deceased, late of the United States navy; that said John Hall left one other heir, named Jane H. Hall, who is a minor, being under eighteen years of age; that all of said heirs reside in the State of Pennsylvania; that your deponent is informed, and believes it to be true, that at the time of his death, said John Hall owned a certain one hundred vara lot in the city and county of San Francisco, known as one hundred vara lot number eighty-nine; that said lot descended to the heirs above named; that your petitioner has been employed by the said heirs to bring an action of ejectment for them, and in their name to recover the possession of said lot; that in the
9 opinion of your petitioner it would be for the benefit of said minor, Jane H. Hall, to join as a party plaintiff in said action; wherefore your petitioner prays that a suitable person be appointed guardian ad litem for said minor, to represent her in the said action, and that an order to that effect be entered.

March 15, 1866.

PHILIP G. GALPIN.

I hereby consent to act as guardian ad litem, or prichem amy; for the infant Jane H. Hall, in action mentioned in foregoing petition.

P. G. GALPIN.

Circuit Court of the United States in and for the northern district of California.

MARY K. HALL *et al*
vs.
ADOLPH UNGER *et al.* } At common law.

Ordered, that Philip G. Galpin be, and he is hereby, appointed guardian ad litem for the minor Jane H. Hall, in an action of ejectment, to be entitled as above and to be brought by the heirs
10 of John Hall, deceased, for the recovery of the possession of one hundred vara lot, numbered eighty-nine on the official map of the city and county of San Francisco.

April, 1866.

OGDEN HOFFMAN,
Dist. Judge.

Endorsed: Filed and entered April 2d, 1866. Geo. C. Gorham, cl'k. By D. T. Sullivan, D. C.

11 In the Circuit Court of the United States, 10th circuit, northern district of California.

Demurrer.

MARY K. HALL *et al.*, plaintiffs:
vs.
ADOLPH UNGER *et al.*, defendants. } Demurrer.

And now comes Henry S. Dexter, Henry Nelson, Lawrence Duncan, C. H. Blackman, (sued as C. Blackman,) C. D. Taylor, Lewis Cutting,

Francis Cutting, Frederick Smith, William H. Hooper, Edward Burr, and Benjamin L. Dean, defendants herein, by J. P. Hoge and Sol. A. Sharp, their attorneys, and demurring to the complaint of the plaintiffs in the above-entitled cause, for grounds of demurrer specify—

1st. That the complaint does not state facts sufficient to constitute a cause of action.

2nd. That the complaint is ambiguous, unintelligible, and uncertain, and insufficient in law.

Wherefore said defendants pray to be hence dismissed with
12 their costs.

J. P. HOGE,
SOL. A. SHARP,
Attorneys for Defendants above named.

Endorsed: Filed May 21, 1866. Geo. C. Gorham, clerk. By Sam'l Neall, D. C.

13 At a stated term of the Circuit Court of the United States for the district of California, held at San Francisco the 30th, July, 1867. Present, Hon. Stephen J. Field, judge.

MARY K. HALL *et al.*
vs
ADOLPH UNGER *et al.*

By consent, ordered that the demurrers of defendants be withdrawn; and on motion of plaintiffs, ordered that the action be dismissed as to the defendants Adolph Unger, A. H. Houston, Robert Sherwood, Numa Dupereu, A. L. Morrison, and Francis Kelly, and Wm. A. Hooper.

14

15 In the Circuit Court of the United States, tenth circuit, in and for the northern district of California.

Answer.

MARY K. HALL *et als.*, plaintiffs,
vs.
ADOLPH UNGER *et als.*, defendants.
} At common law.

The defendants, Henry S. Dexter, Henry Nelson, Lawrence Duncan, C. H. Blackman, (sued as C. Blackman,) C. D. Taylor, Lewis Cutting, Francis Cutting, Frederick Smith, William H. Hooper, E. W. Burr, (sued as Edward Burr,) and Benjamin D. Dean, trustee, &c., by J. P. Hoge and Sol. A. Sharp, their attorneys, answering the complaint herein.

First. For a first defence to the said several causes of action in the said complaint mentioned, deny each and every allegation thereof.

Second. And for a further and separate defence to the said several

causes of action in the complaint mentioned, the said defend-
16 ants, by said Hoge & Sharp, their attorneys, say that they are not guilty of the said supposed trespasses and ejectment above laid to their charge, or either of them, or any part thereof, in manner and form as the said plaintiffs have above thereof complained against them, &c.

Third. And for a further and separate defence to the said several causes of action in the said complaint mentioned, the said defendants allege, that long before the commencement of this action, that is to say, on the fifth day of June, A. D. 1852, the said defendants and their grantors, and those under whom they claim, became and were lawfully seized in fee of all and singular the lands and premises in the said complaint described, with the appurtenances, and entitled unto and possessed of the same, in their sole and absolute right, and from thence at all times down to the time of the commencement of this action, have continued to be, and still continue to be, so seized in fee of every part and parcel thereof, and entitled unto and possessed of the same, in their own sole and absolute right.

17 Fourth. And for a further and separate defence to the said several causes of action in the said complaint mentioned, the said defendants allege, that long before the commencement of this action, that is to say, on the 5th day of April, A. D. 1853, the said defendants and their grantors, and those under whom they claim, became and were lawfully seized in fee of all and singular the lands and premises in the said complaint described, with the appurtenances, and entitled unto and possessed of the same, in their sole and absolute right, and from thence at all times down to the time of the commencement of this action, have continued to be, and still continue to be, so seized in fee of every part and parcel thereof, and entitled unto and possessed of the same, in their sole and absolute right.

Fifth. And for a further and separate defence, the said defendants allege, that no right or title in or to the said lands and premises, or any part thereof in the complaint described, accrued to the plaintiffs within the space of five years next before the commencement
18 of this action; and that if any right or title ever accrued to the said plaintiffs the same accrued more than five years before the time of the commencement of this action, and that neither the said plaintiffs nor their ancestors, predecessors, or grantors, nor those from or under whom they claim, were seized or possessed of the premises in question within five years before the commencement of this action.

Sixth. And for a further and separate defence to the said several causes of action in the complaint mentioned, the defendants allege—

1st. That they and their grantors, and those from and under whom they claim, entered into the possession of said premises in the complaint described, under claim of title exclusive of any other right—founding such claim upon written instruments, to wit, certain deeds from John Hall and Mary K., his wife, to Daniel D. Page—being conveyances of the premises in question.

2nd. That there has been a continued occupation and possession of

the premises included in such instruments, and of the whole
19 thereof, under such claim for more than five years last before the commencement of this action.

3rd. That during all said time said occupied premises have been usually cultivated and improved and protected by a substantial enclosure, and have been continuously used by these defendants and their grantors, and those from and under whom they claim, for their ordinary purposes and uses.

Seventh. And for a further and separate answer to the said several causes of action in the said complaint mentioned, the said defendants allege, that they, and those under whom they claim, have been in the actual continued occupation of the premises in the complaint described, and the whole thereof, under a claim of title, exclusive of any other rights, for more than ten years last before the commencement of this action, and that during all said time said occupied premises have been protected by a substantial enclosure, and have been usually cultivated and improved.

Eighth. And for a further and separate defence to the said several causes of action in the said complaint mentioned, the said
20 defendants allege that the said plaintiffs, at the commencement of this action, were not seized in fee or otherwise, and were not the owners of the said premises in the complaint descibed, nor any part thereof, and were not entitled to the possession of the same, or of any part thereof.

Ninth. And for a further and separate defence to the said several causes of action in the complaint mentioned, these defendants allege that the said defendants, Henry S. Dexter, Henry Nelson, Lawrence Duncan, C. H. Blackman, C. D. Taylor, Lewis Cutting, Francis Cutting, Frederick Smith, William H. Hooper, E. W. Burr, and Benjamin D. Dean, at the times mentioned in the complaint, and ever since, have held and occupied portions of the premises in the complaint described, separately and not jointly, to wit:

The defendant, Henry S. Dexter, the part described as follows: Commencing at a point on the southwesterly line of one hundred vara lot number eighty-nine, which point is perpendicularly distant one hundred feet northwesterly from the northwest line of Bryant
21 street; thence northwesterly along said southwesterly line, one hundred and fifty feet; thence at right angles northeasterly one hundred and thirty-seven feet and six inches; thence at right angles southeasterly one hundred and fifty-three feet; thence at right angles southwesterly, and parallel with Bryant street, one hundred and thirty-seven feet and six inches, to the place of beginning.

And the defendant, Henry Nelson, as owner, and the said defendants, Lawrence Duncan, C. H. Blackman, and C. D. Taylor, as tenants of the said Nelson, the part described as follows: Commencing at a point on the nortwesterly side of Bryant street, distant two hundred and seventy-five feet northeasterly from the northeast corner of Second and Bryant streets; thence northeasterly, along said northwesterly line of Bryant street, one hundred and thirty-seven feet and six inches; thence at right angles northwesterly one hundred feet;

thence at right angles southwesterly one hundred and thirty-seven feet and six inches; thence at right angles southeasterly one hundred feet, to the place of beginning.

And the defendant, Francis Cutting, that part described as follows: Commencing on the northwesterly line of Bryant street, at
22 a point distant three hundred and fifty-two feet and six inches southwesterly from the westerly corner of Bryant street and First street; thence southwesterly, along the northwesterly line of Bryant street, thirty feet; thence at right angles northwesterly one hundred feet; thence at right angles northeasterly thirty feet; thence at right angles southeasterly one hundred feet, to the place of beginning.

And the defendant, Frederick Smith, holding the same under his wife, Sarah E. Smith, whose separate property it is, that part described as follows: Commencing at a point on the northwesterly line of Bryant street, distant two hundred and seventy-five feet southwesterly from the westerly corner of Bryant and First streets; thence southwesterly along the northwesterly line of Bryant street, seventy-seven feet and six inches; thence at right angles northwesterly one hundred feet; thence at right angles southwesterly, and parallel with Bryant street, sixty feet; thence at right angles northwesterly seventy-five feet; thence at right angles northeasterly, and parallel with Bryant street, one hundred and thirty-seven feet and six inches;
23 thence at right-angles southearsterly one hundred and seventy-five feet, to the place of beginning.

And the said defendants, E. W. Burr and Benjamin D. Dean, holding the same subject to certain trusts; and the defendants, Henry Nelson, Francis Cutting, and Frederick Smith, and his wife, Sarah E. Smith, holding the same under the said defendants, Burr and Dean, the said several portions hereinbefore described as being held by the defendants, Nelson, Francis Cutting, and Smith.

Tenth. And for a further and separate defence to the said several causes of action in the complaint mentioned, these defendants aver and allege that the defendant, Henry S. Dexter, is the owner, in fee-simple, and in possession of the following part of the premises described in said complaint, that is to say: Commencing at a point on the southwesterly line of one hundred vara lot eighty-nine, which point is perpendicularly distant one hundred feet northwesterly from the northwest line of Bryant street; thence northwesterly, along said southwesterly line, one hundred and fifty feet; thence at right angles northeasterly one hundred and thirty-seven feet and six inches; thence at right angles southeasterly one hundred and fifty feet; thence
24 at right angles southwesterly, and parallel with Bryant street, one hundred and thirty-seven feet and six inches, to the place of beginning.

That the defendant, Henry Nelson, is the owner, in fee-simple, and in possession of the following part of the premises described in said complaint, that is to say: Commencing at a point on the northwesterly line of Bryant street, distant two hundred and seventy-five feet northeasterly from the northeast corner of Second and Bryant

streets; thence northeasterly, along said northwesterly line of Bryant street, one hundred and thirty-seven feet and six inches; thence at right angles northwesterly one hundred feet; thence at right angles southwesterly one hundred and thirty-seven feet and six inches; thence at right angles southeasterly one hundred feet, to the place of beginning.

That the defendant, Lewis Cutting, is the owner, in fee-simple, and in possession of the following part of the premises described in said complaint, that is to say: Commencing on the northwesterly line of Bryant street, at a point distant three hundred and eighty-
25 two feet and six inches southwesterly from the westerly corner of Bryant and First streets; thence southwesterly, along the northwesterly line of Bryant street, thirty feet; thence at right angles northwesterly one hundred feet; thence at right angles northeasterly thirty feet; thence at right angles southeasterly one hundred feet, to the place of beginning.

That the defendant, Francis Cutting, is the owner in fee-simple, and in possession of the following part of the premises described in the said complaint, that is to say: Commencing on the northwesterly line of Bryant street, at a point distant three hundred and fifty-two feet and six inches southwesterly from the westerly corner of Bryant and First streets; thence southwesterly along the northwesterly line of Bryant street thirty feet; thence at right angles northwesterly one hundred feet; thence at right angles northeasterly thirty feet; thence at right angles southeasterly one hundred feet, to the place of beginning.

That Sarah E. Smith, wife of the defendant, Frederick Smith, is the owner, in her own right, in fee-simple, and is in possession of the following part of the premises described in said complaint, that is to say: Commencing at a point on the northwesterly line of
26 Bryant street, distant two hundred and seventy-five feet southwesterly from the westerly corner of Bryant and First streets; thence southwesterly along the northwesterly line of Bryant street seventy-seven feet and six inches; thence at right angles northwesterly one hundred feet; thence at right angles southwesterly and parallel with Bryant street sixty feet; thence at right angles northwesterly seventy-five feet; thence at right angles northeasterly and parallel with Bryant street, one hundred and thirty-seven feet and six inches; thence at right angles southeasterly one hundred and seventy-five feet, to the place of beginning.

That the defendant, E. W. Burr and Benjamin D. Dean, are the owners, subject to certain trusts, and are in possession of the following parts of the premises described in said complaint, that is to say: That part commencing at a point on the northwesterly side of Bryant street, distant two hundred and seventy-five feet northeasterly from the northeast corner of Second and Bryant streets: thence northeasterly along said northwesterly line of Bryant street one hundred and thirty-seven feet and six inches; thence at right angles
27 northwesterly one hundred feet; thence at right angles southwesterly one hundred and thirty-seven feet and six inches;

thence at right angles southeasterly one hundred feet to the place of beginning; also, that certain other part commencing on the northwesterly line of Bryant street at a point distant three hundred and fifty-two feet and six inches southwesterly from the westerly corner of Bryant and First streets; thence southwesterly along the northwesterly line of Bryant street thirty feet; thence at right angles northwesterly one hundred feet; thence at right angles northeasterly thirty feet; thence at right angles southeasterly one hundred feet, to the place of beginning; also, that certain other part commencing at a point on the northwesterly line of Bryant street, distant two hundred and seventy-five feet southwesterly from the westerly corner of Bryant and First streets; thence southwesterly along the northwesterly line of Bryant street seventy-seven feet and six inches; thence at right angles northwesterly one hundred feet; thence at right angles southwesterly, and parallel with Bryant street, sixty feet; thence at right angles northwesterly seventy-five feet; thence at
28 right angles northeasterly, and parallel with Bryant street, one hundred and thirty-seven feet and six inches; thence at right angles southeasterly one hundred and seventy-five feet, to the place of beginning.

That the said other defendants, Lawrence Duncan, C. A. Blackman, C. D. Taylor, and Frederick Smith, were, at the time of the commencement of this action, and still are, in the occupation of the said lands and premises or of some part or parts thereof, under said right, title, and possession of the said Dexter, Nelson, Lewis Cutting, Francis Cutting, Sarah E. Smith, E. W. Burr, and Benjamin D. Dean, or some of them.

And the said defendant, Wm. A. Hooper, avers that he has not now and did not have at the time of the commencement of this action, nor claim to have any right, title, or interest whatever in the premises mentioned and described in said complaint, or any portion thereof, and expressly disclaims any interest in the same, and every part thereof, and avers that all right, title, and interest whatever, had or claimed by him in and to said premises, or a portion thereof,
29 at any time had been fully transferred, assigned, sold, and conveyed by him to one John A. Hooper before the commencement of this action.

Wherefore these defendants pray to be hence dismissed with their costs in this behalf by them expended.

SOL. A. SHARP,
JNO. P. HOGE,
Attorneys for Def't Henry Dexter et als.

Due service of a copy of the within answer admitted this 2nd day of July, A. D. 1866.

P. G. GALPIN.

Endorsed: Filed July 2, 1866. G. C. Gorham, cl'k. By S. Neall, D. C.

30

31 In the Circuit Court of the United States for the State of California.

Discontinuance.

MARY K. HALL *et al.*
vs.
ADOLPH UNGER *et al.*, defendants.

The above-entitled action is hereby discontinued as to Francis Kelly and A. L. Morrison, defendants therein, and the clerk of said is directed to enter such continuance as to them.

October 13, 1866.

P. G. GALPIN,
Plaintiff's Attorney, Guardian at litem of Jane H. Hall.

Endorsed: Filed Oct'r 13, '66. E. C. Gorham, clerk; by S. Neall, D. C.

32

33 U. S. Circuit Court.

Discontinuance.

MARY K. HALL *et al*
vs.
ADOLPH UNGER *et al.*

To the clerk of the court:

You will please discontinue this case as to the defendants Francis Cutting, Louis Cutting, Frederick Smith, and Henry Wilson, and John A. Hooper.

PHILIP G. GALPIN,
Attorney for Plaintiffs.

Endorsed: Filed, 20 Septemb., 1867. G. E. Whitney, clerk.

34

35 U. S. Circuit Court.

Verdict.

ADOLPH UNGER *et al*
vs.
MARY K. HALL *et al.*

We, the jury, find a verdict in favor of the plaintiffs and against the defendants for the possession of the several pieces of land described in the several answers of respondents herein.

Dated August 9, 1867.

JOHN S. DAY, *Foreman.*

Endorsed: Filed and entered 9 Aug., 1867. G. C. Gorham, cl'rk, by John O. Wheeler, D. C.

36

37 In the Circuit Court of the United States, ninth district, for the district of California.

MARY K. HALL *et al.*
vs.
ADOLPH UNGER *et al.*

This cause having, on the 30th day of July, A. D. 1867, been called in its order for trial, upon the calendar of this court, Hall, McAllister, and P. G. Galpin, esq., appearing for the plaintiffs, and J. P. Hoge and Sol. A. Sharp, esquires, for the defendants, the death of the plaintiff, Mary K. Hall, having been suggested, it was by the court ordered that the trial of this cause proceed as to the rights of the plaintiffs other than the said Mary K. Hall, deceased, and on motion of plaintiffs' counsel, the action having been dismissed as to the defendants Adolph Unger, A. H. Houston, Robert Sherwood, Numa Dupereu, A. L. Morrison, Francis Kelly, and William A. Hooper; and on like motion, the claim for mesne profits having been withdrawn and stricken from the complaint herein, the following named persons were accepted by the respective parties and sworn as jurors to try the cause, viz: A. Hay, F. R.
38 Johnson, George Boyd, D. S. Sutton, H. B. Land, John Wheeler, F. A. Will, E. F. Arnold, James Dexter, W. C. Hoagland, John S. Day, and H. M. Harris; and after the examination of witnesses for the plaintiffs and defendants, the cause having been continued from day to day, on the 31st day of July, and the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, and 9th days of August, 1867; and the testimony having been closed, and the issue having, after the argument of counsel, and under the instruction of this court, been submitted to the jury, who thereafter returned the following verdict, viz:

"We, the jury, find a verdict in favor of the plaintiffs and against the defendants for the possession of the several parcels of land described in the several answers of defendants herein."

And the said action having also thereafter, on motion of the plaintiffs' counsel, been dismissed as to the defendants, Francis Cutting, Lewis Cutting, Frederick Smith, Henry Wilson, John A. Hooper, Lawrence Duncan, C. Blackman, C. D. Taylor, Edward Burr, and Benjamin T. Dean; and the court having thereupon ordered that judgment be entered against the remaining defendants, in
39 accordance with said verdict.

Now, therefore, in consideration of the premises, it is ordered and adjudged that the said plaintiffs, J. Ladson Hall, Hettie W. Hall, and Jane H. Hall, by her guardian ad litem, Philip G. Galpin, do have and recover against the said defendant, Henry S. Dexter, the possession of the following real estate, as described in the answer of said defendant, Henry S. Dexter, as follows, to wit: Commencing on at a point, on the southwesterly line of one hundred vara lot number (89) eighty-nine, which point is perpendicularly one hundred feet northwesterly from the northwest line of Bryant street; thence northwesterly, along said southwesterly line one hundred and fifty

feet; thence at right angles northeasterly one hundred and thirty-seven feet and six inches ; thence at right angles southeasterly one hundred and fifty feet; thence at right angles southwesterly and paralled with Bryant street, one hundred and thirty-seven feet and six inches, to the place of beginning; said real estate being in the city of San Francisco, in said district and State of California.

And it is further ordered and adjuged that the said plaintiffs, J. Ladson Hall, Hettie W. Hall, and Jane H. Hall, by their
40 guardian ad litem, Philip G. Galpin, do have and recover of and from the said defendant, Henry S. Dexter, their costs and charges in this behalf expended, taxed at the sum of dollars.

Judgment entered this 8th day of November, A. D. 1867.

Attest: GEO. E. WHITNEY, *Clerk.*

A true copy of the judgment. Entered on Judgment Register, Common Law, No. 1, pp. 309, 310.

Attest: GEO. E. WHITNEY, *Clerk.*
By A. D. SMITH, *D. C.*

41 In the Circuit Court of the United States, for the district of California.

MARY K. HALL *et al* } No. 201.
vs.
ADOLPH UNGER *et al.* }

UNITED STATES OF AMERICA, *District of California, ss:*

I, Geo. E. Whitney, Clerk of the Circuit Court of the United States for the District of California, do hereby certify that the foregoing papers herein annexed constitute the judgment record, in the above-entitled cause, recorded in Judgment Register, Com. Law, No. 1, of said court, at page 309 and 310.

Witness my hand and the seal of said court, this eight day of November, A. D. 1867.

[SEAL.] G. E. WHITNEY, *Clerk.*

Endorsed: "Judgment record." Filed 8th November, 1867. Geo. E. Whitney, clerk.

42

43 In the Circuit Court of the United States, district of California.

Bill of exceptions.

MARY K. HALL *et als* }
vs.
ADOLPH UNGER *et als.* }

Be it remembered that on the trial of the above-entitled cause, the counsel for plaintiffs suggested the death of Mary K. Hall, which

occurred in July, 1867, and asked that the same be entered on record. Whereupon it was ordered by the court that the death of Mary K. Hall be noted on the record; that the name of Mary K. Hall be stricken from the complaint; and that all further proceedings herein be had and taken in the name of the plaintiffs other than the said Mary K. Hall, and the plaintiffs, in order to sustain the issue on their part called as a witness one T. M. Leavenworth, who
44 testified that during December, 1848, he was alcalde in San Francisco; was appointed 2nd alcalde in October, 1847, some months after 1st alcalde, and subsequently elected by the people, and continued to act until August, 1849.

The plaintiff then produced and exhibited to him a paper writing, purporting to be a grant from the witness, as alcalde of San Francisco, to John Hall, dated Decemb. 30th, 1848, of certain lots in San Francisco; and he testified that the signature to said grant was his, and that he made said grant as alcalde of San Francisco.

Also the petition purporting to be a petition of John Hall for said lands, and annexed to said grant, and the witness testified that it was signed by John Hall in his presence, and that Hall was at that time a lieutenant in the navy.

The plaintiffs then offered the same in evidence, and it was thereupon admitted and read in evidence to the jury, and marked Exhibit A. E. S., said petition and grant in the words and figures following, namely:

TERRITORY OF CALIFORNIA, DISTRICT OF SAN FRANCISCO,
December 30, A. D. 1848.

45 Know all men by these presents that John Hall has presented the foregoing petition for a grant of land, in the vicinity of San Francisco, therein described.

Therefore, I, the undersigned alcalde and chief magistrate of San Francisco, Upper California, do hereby give, grant, and convey unto the said John Hall, his heirs and assigns, forever, the lot of ground as set forth in the petition, by a good and sufficient title in accordance with the established customs and regulations, said lot being one hundred varas square, and lying and being situated in the southern vicinity of the town of San Francisco, and numbered on the plan of the one hundred vara survey eighty-nine (89.)

In testimony whereof, I have hereunto set my hand as alcalde and chief magistrate of the district of San Francisco.

Dated the day and year above written.

T. M. LEAVENWORTH,
Alcalde, Dis't San Francisco, U. Cal.

Received for for this lot of land $25. exclusive of office fees.

T. M. LEAVENWORTH,
Alcalde of San Francisco.

46 To T. M. Leavenworth, alcalde and chief magistrate district San Francisco:

Your petitioner, the undersigned, a citizen of the United States, respectfully prays the grant of a title to a certain lot of ground in the southern vicinity of the town of San Francisco, and containing one hundred varas square, and numbered on the plan of the one hundred vara survey (89) eighty-nine.

JOHN HALL.

It is admitted that said petition and grant were in the form usual at that time; and that it appeared by said petition that said John Hall was then a citizen of the United States, and not of California; and that the said petition and grant embraced the lands in controversy in this suit.

The plaintiffs then produced and offered in evidence the record of said grant, from book number one, of certified grants, page sixty.

The certificate of said grant, in blotter B, page 44, of the records of the city and county of San Francisco, and also record of said grant, in book B. D. R. of said records, p. 44.

The same were severally admitted in evidence, and read to
47 the jury. The plaintiffs also proved that said books, book number one of certified grants, blotter B, and book B. D. R. came from the custody of the county recorder, of the city and county of San Francisco, and were proper books of record deposited in and belonging to the office and custody of said recorder; and that said alcalde grant was recorded in each of said three books previous to the 3rd April, 1850.

The plaintiffs then put in evidence all the proceedings in the San Francisco pueblo case, the petition, decree of land commission, appeal to District Court, decree of District Court, transfer to Circuit Court, appeal to Supreme Court, and decree of dismissal of appeal. The claim of the pueblo of San Francisco against the United States, duly filed before the board of United States land commissioners, on the second day of July, 1852; said claim confirmed by the decree of the said United States land commissioners, on the 3rd day of October, 1854; appeal duly taken from said decree of United States land commissioners to the United States District Court, in and for
48 the northern district of California, and the transcript on such appeal duly filed in the said U. S. District Court, on the 3rd day of March, 1856; said claim was duly transferred from said United States District Court to the Circuit Court of the United States, for California, on the 5th day of September, 1864; decree of United States Circuit Court for California, in said cause of United States *vs.* the pueblo of San Francisco, rendered on the 18th of May, 1865, confirming said claim of the pueblo of San Francisco to her pueblo lands; appeal duly taken from said decree of May 18, 1865, to the United States Supreme Court on the third of September, 1866; mandate from Supreme Court of the United States, dismissing said appeal filed in the United States Circuit Court for California, on the fourth day of February, 1867. It was admitted by defendants' coun-

sel, that no patent had ever been issued by the United States to the city of San Francisco, or to the city and county of San Francisco.

It was then admitted that the defendants are now, and were at the commencement of this action, in possession of the premises claimed in the complaint herein; and that the particular portion
49 of said premises so possessed by each of said defendants is correctly set forth in their respective answers herein, and service on each of the defendants by the duly authorized agent of plaintiffs of a written demand of possession of the premises sued for on the 28th March, 1866; and that the said premises are within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April 15th, 1851; and that said premises have always been east of Larkin street and north of Johnston street.

It was also admitted by defendants that the first statute incorporating the city of San Francisco was passed April 15th, 1850. It was also admitted by defendants that the premises in controversy were never reserved or set apart for her own or the public use by the city of San Francisco, or by the city and county of San Francisco; also, that the premises in controversy were never occupied or designated for military, naval, or other public uses by the United States, or any of the authorities thereof.

The plaintiffs then proved by competent evidence, that John
50 Hall married Mary K. Hall in the city of Philadelphia, on the 22nd day of November, in the year 1838; and that they had born of that marriage the following children:

1. James Lawson Hall, born August 27, 1839.
2. Mary Kelly Hall, born October 20, 1843.
3. Hetty Willis Hall, born September 10, 1845.
4. Jane Harris Hall, born April 29, 1851.

They further proved, that in the spring of 1848 John Hall was a lieutenant in the navy, and that in that year he went to California in the United States sloop of war St. Mary's as a lieutenant, and that Captain Crowninshield was in command, and that he arrived in California in the latter part of 1848, and returned east in the summer of 1849.

The plaintiffs then offered in evidence the acts of Congress of March 8, 1866, and of July 1st, 1864, (vol. 13, U. S. Statutes at Large, p. 333 and 335,) confirming the Van Ness ordinance, and relinquishing the title of the United States to lands covered by that ordinance; also the "Van Ness ordinance" and the laws of the State of California confirming the ordinance, (statutes of California, A. D. 1858, page 52.)

It was then admitted that the land in controversy is within the
51 four square leagues of the pueblo of San Francisco, and also within the corporate limits of San Francisco, as such limits were defined on the 1st July, 1864, and also on the 8 March, 1866, and within the lands confirmed by the decree of the United States Circuit Court for California, rendered May 18, 1865, in the San

Francisco pueblo case against the United States, and not within any land set apart for public uses.

The plaintiffs then rested.

The defendants' counsel thereupon requested the court to instruct the jury that upon the facts in proof on the part of the plaintiff the defendants are entitled to a verdict in their favor upon the following grounds:

That the plaintiff relies on the said grant from Leavenworth, alcalde, dated December 30, 1848, upon the Van Ness ordinance, and the laws of California, and of the United States in aid thereof.

That under the act of the legislature of the State of California, approved March 5th, 1864, and entitled "An act to limit the time for the commencement of civil actions in certain cases."

52 The plaintiffs having commenced this action, as appears by the record in court, more than one year after the said act took effect, they must show an actual possession of the premises in controversy in themselves or their ancestors within five years next before the commencement of this action, which they have failed to do.

And because no administration in the estate of either John or Mary K. Hall has been proved, and also because it appears from the evidence that at the date of the said petition and grant the said John Hall was not a resident or citizen of California, but of New Jersey.

The court refused so to instruct the jury, and the defendants, by their counsel, then and there excepted to such refusal.

The defendants then offered and read in evidence a paper purporting to be a power of attorney from John Hall to James W. Harris, which was as follows:

"Whereas I, John Hall, lieutenant in the navy of the United States, am entitled in fee of the three following lots or parcels of land in the city of San Francisco and State of California, one

53 lot being one hundred varas square, and being situated in the southern vicinity of the town of San Francisco, and numbered on the plan of the one hundred vara survey eighty-nine (89,) and granted unto me by T. M. Leavenworth, alcalde of district of San Francisco, by grant dated December 30, A. D. 1848, and recorded on page 44 of book B, of said district records, archives of San Francisco; also one other similar lot in the same vicinity granted unto me by the said alcalde, and numbered one hundred and ten (110) by a grant dated December 30, 1848, and recorded on page 44 of book B of said district records; also one other similar lot in the same vicinity granted unto Charles W. Pickering by the said alcalde, and numbered one hundred and fifteen (115) by a grant dated December 30, 1848, and recorded on page 46 of said district records, and which last mentioned lot the said Charles W. Pickering granted and conveyed unto me by grant dated December 5, 1850, and recorded in the office of the alcalde in book F of deeds, at page 319. Now, know all men

54 by these presents that I, the said John Hall, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint, and in my place, put James

W. Harris, as my true and lawful attorney in fact for me, and in my name and place take the management, control, and direction of said three lots and each of them, with powers to make sale of the said lots and each of them, and for me and in my place and stead to sign, and execute, and deliver good and effectual conveyances and assurances of title in the law for said lots, and each of them; with power, also, the said lots and each of them for me and in my stead effectually to mortgage, charge, or otherwise encumber; with power, also, of said lots, or either of them, have been or may hereafter be sold for taxes to redeem the same, and in general with full and ample power as my attorney in fact to do in his mere direction any and every act matter and thing whatsoever in relation to said lots, and to each of them, which I myself might or could do were I personally present and acting. Hereby giving and granting to my said attorney
55 my whole power in and about the premises; and I do furthermore, by these presents, fully authorise and empower the said James W. Harris to constitute, appoint, and empower an attorney or attorneys under him, and to such attorney or attorneys to delegate the whole or any portion of the power wherein he himself is clothed by these presents, and again in his discretion to revoke said powers of attorney, and to appoint another attorney or attorneys, hereby ratifying, holding to be effectual, every act by my said attorney or his or his substitute lawfully due in the premises.

Witness my hand and seal the twenty-seventh day of December, A. D. 1852.

[SEAL.] JOHN HALL, *U. S. Navy.*

Witness:
JOHN BRODHEAD.
WM. ASHMEAD.

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

Be it remembered, that on this the twenty-seventh day of December, Anno Domini one thousand eight hundred and fifty-two, before
56 me, John Brodhead, a commissioner resident in Pennsylvania, duly appointed by the governor of the State of California, to take acknowledgment of deeds, powers of attorney, &c., personally appeared the above-named John Hall, the individual described in, and who has executed. the foregoing power of attorney; and I having first made known unto him the contents thereof, he di. acknowledge that he signed, sealed, and delivered the same as his voluntary act and deed, for the uses and purposes therein mentioned; and I certify that the said John Hall is personally known to me to be the individual described in, and who, executed the said instrument; and that said John Hall signed his name to said instrument above an erasure made by me.

In testimony whereof, I have hereunto set my hand, and affixed my official seal, this 27th day of December, A. D. 1852.

[SEAL] JOHN BRODHEAD,
A Commissioner for the State of California,
158 *Walnut st., Philadelphia.*

57 The defendants then offered in evidence a power of attorney from Mary K. Hall to James W. Harris, which was written on the same sheet of paper as foregoing power of attorney from John Hall to James W. Harris, and which is hereinafter set forth. The counsel for the plaintiffs objected to the admission of said paper on the ground, first, that at that time in this State a married woman could not make a power of attorney; second, that the acknowledgment is not a proper acknowledgment for a married woman, in that, first, it does not state that Mary K. Hall was personally known to the officer; 2nd, that the words, "separate and without the hearing of her husband" and the words, "undue influence of her husband," and that she does not wish "to retract the execution of the same," are omitted; and third, that said power of attorney is immaterial and irrelevant.

The court excluded the same as a power of attorney, to which the defendants then and there objected by their counsel.

58 The defendants then offered and read in evidence a paper purporting to be a substitution, by said James W. Harris, of David B. Rising, under the said power of attorney to him, which was in due form.

The defendants then put in evidence a title by mesne conveyances, in proper form, regularly acknowledged and recorded, and upon good and valuable considerations, so far as regarded the defendant, Henry S. Dexter, from said John Hall, under said power of attorney to James W. Harris, to them of the respective portions of the premises in controversy as set forth in their answer therein.

The defendants then called Henry S. Dexter as a witness, who testified as follows: "I have known the premises since 1852. Hemenway was in possession of the lot as tenant of Daniel D. Page at the time I bought; after I bought we retained Mr. Hemenway as tenant, to keep up fences; I bought in September 22, 1853. There was a house on it, built by Daniel D. Page, from whom we bought, worth fifty dollars per month, a picket fence, good and substantial fence,

59 would turn cattle. Morse, and I paid the consideration mentioned in the deed, which was thirty thousand dollars. I continued, without selling any portion, I think, until 1860, lot 89. Persons, to whom I sold, took possession immediately on sale. I sold a portion to defendant Nelson; it was already fenced, and Nelson commenced building."

The defendants then rested.

The plaintiff then offered in evidence deposition of Edward W. Wright, to prove the insanity of said Hall at the time of the execution of said power of attorney.

The counsel for the defendants then and there objected to all testimony as to the insanity of said Hall, because a power of attorney and the deed thereunder cannot be attacked collaterally, but must be set aside in a court of equity.

The court overruled the objection and admitted the testimony, to which ruling the defendants then and there excepted.

The said deposition was then read to the jury, and said Wright

testified that he was a retired merchant, forty-nine years of age,
60 and had been acquainted with John Hall since 1825; that before and long after the 30th December, 1848, John Hall was a resident and citizen of the State of New Jersey, and that the witness married a sister of Mrs. Hall.

It appeared by said deposition that plaintiff propounded to said witness the following questions, numbered 36, as follows: "Who, if any one, recommended his (John Hall) going to the asylum?"

To which the witness made the following answer: "Both of his physicians I have named, in which opinion all his family and friends coincided."

To which question and answer the defendants' counsel then and there objected, and moved to exclude on the ground that the same is hearsay and matter of opinion, and not facts; which objection and motion was overruled by the court, and defendants then and there excepted, and said question and answer was then read to the jury.

The defendants, in rebuttal, then offered to prove that they purchased the premises in dispute in good faith for a full con-
61 sideration, and without notice of the alleged insanity of John Hall, which testimony was objected to by plaintiff, and the objection sustained by the court, and the testimony excluded; to which ruling the defendants then and there excepted.

The defendants then offered and read in evidence the deposition of John Brodhead, commissioner of deeds for the State of California, resident of Philadelphia, in the State of Pennsylvania, in proof of the execution and acknowledgment of the powers of attorney from John Hall and Mary K. Hall to James W. Harris, and the sanity of John Hall at the date thereof, which is in the words and figures following:

John Brodhead, of the city of Philadelphia, lumber manufacturer, aged 45 years and upwards, being publicly sworn pursuant to the commission hereunto annexed, and examined on the part of the defendants, and deposeth and saith as follows, viz:

I resided on the 27 day of December, 1852, at Philadelphia, Pennsylvania. I was then an attorney-at-law, and commissioner of deeds for the State of California and other States.

62 Question 1. Please state whether you were commissioned by the governor of the State of California to take the acknowledgment of deeds for the conveyance of real estate in that State.

(Objected to by Mr. Pike, claiming that the commission should be produced.)

Answer. I was. I do not know where my commission is. I have not got it, to my knowledge. I do not know whether I retained or destroyed it. I removed some of my papers to New York; I do not know about the commisssion. Some were limited in term of office, and some were not. If my California commission was limited in time, I destroyed it. In all probability, if not limited in time, it is possible it is in existence. I remember taking the acknowledgment

of John Hall of a power of attorney, the 27th of December, 1852, or about that time, to James W. Harris. I cannot say that I remember the name of the person to whom it was given. (Prior to the answer in respect to said power, Mr. Pike objected to any testimony touching
63 the aknowledgment or contents without the production of the original instrument, unless preliminary proof is made of its loss or destruction.) I was requested to go out to the Frankford Asylum to take the acknowledgment of a man named Hall, who owned property in California, to power of attorney to sell lands; that is, to enable his brother-in-law to sell lands in California. He was represented to me to have been or was an officer in the United States navy. I read the power of attorney to him, and handed it to him to read, and asked him if he understood it. He said, "perfectly," or words to that effect. He said that the property was a valuable property, and he wanted it sold for the benefit of his wife and children. He said nothing further that I remember.

Question 2. Please state from the conversation you had with him, and from what he said after the letter of attorney was read to him, whether he comprehended the nature and character of the instrument, and what authority and power was delegated thereby.

(Objected to by Mr. Pike as asking the opinion of the witness.)

64 Answer. He said he understood it.

Question 3. From the conversations you had with him at that time, his conduct and appearance, do you believe him then to have been of sound mind, memory, and understanding?

(Objected to by Mr. Pike as asking witness's opinion, he not being an expert.)

Answer. I can't believe that he was, on all subjects, of sound mind, for the simple reason that he was an inmate of the asylum; but that in regard to the power of attorney, he was clear as to what power he was giving.

Question 4. From his appearance and conversation, although he was in an insane asylum at the time he acknowledged and executed that paper, do you believe he had a lucid interval, so that he perfectly understood what he was doing, and knew of the property he was authorizing to be conveyed?

(Objected to on the same ground as the last objected to, and because the question is leading.)

65 Answer. There was nothing in his appearance that led me to suppose that he was insane; and from the fact that he told me why he wanted the property to be sold, I was led to believe he was clear and had a lucid interval. I was there a very short time.

Question 5. Would you at that time, as a commissioner for taking the acknowledgment of deeds, have permitted him to execute the instrument and you taken the acknowledgment, unless he had been of sufficient mind, memory, judgment, and understanding to execute such paper?

(Objected to for same reasons as given in last objection.)

Answer. I would not.

Question 6. Please state whether on or about the 3rd of January, 1853, as a commissioner for the State of California, you did not take the acknowledgment of Mrs. Mary Hall, the wife of Lieutenant Hall, of another letter of attorney.

(Objected to, upon the ground that the original should be pro-
66 duced, both of the instrument and the acknowledgment, unless preliminary proof is given of their loss or destruction.)

Answer. I have a very indistinct recollection of taking an acknowledgment, but cannot say when or where.

Question 7. Who prepared the letter of attorney which was acknowledged before you?

Answer. I don't know who. My recollection is, that Mr. Theodore Cuyler introduced me to the gentleman to whom the power of attorney was given. I don't remember whether the gentleman accompanied me to the Frankford asylum or not. (Witness being shown a paper dated 27 December, 1862, purporting to be signed by John Hall, U. S. navy, and the acknowledgment taken before witness, marked A. E. S., is asked if he believes it to be a copy of the letter of attorney executed before him by John Hall.)

(Question objected to, on the ground that the loss or destruction of the original has not been shown.)

67 Answer. I have no doubt it is a copy.

Examination-in-chief closed.

Cross-examination.

By Mr. Pike, for plaintiff:

I do not remember the date of the power nor the name of the party to whom it was given.

Ques. 8. Do you remember whether it was a general or special power?

Answer. My recollection is that he gave a power to sell certain property for the benefit of his wife and children. I don't think the power stated for whose benefit the sale was made. I do not remember whether it contained a power of substitution or not. I do not remember whether the power bears date of the day of acknowledgment or the previous day. I recollect nothing about the power of attorney apart from the copy. I cannot tell anything about the contents beyond what I have stated, without reference to the copy. I did not know John Hall; never saw him except on the oc-
68 casion stated. I do not remember any conversation with Mr. Cuyler before going to the asylum. Mr. Cuyler, or some one, told me that Mr. Hall was a patient there.

Ques. 9. Was there no conversation about the legality or effect of an acknowledgment of such a person?

Answer. None, that I remember. I must have been left under the impression that the man had lucid intervals, else I would not have gone. I recollect distinctly my visit to Frankford, and the room where I saw him on my arrival. I was conducted to a general recep-

tion room, and Hall was brought into my room. I forget who was in the room. I think the superintendent or some official introduced me and then left; but I am not clear on these points. I don't remember how Mr. Hall was dressed. I don't recollect the arrangement of the room, or what was in it.

Ques. 10. Will you state as fully as you can the conversa-
69 tion between you and Mr. Hall before signing the power?

Answer. I have no recollection. He talked a little after ntroduction, when I stated what I came for. He listened to the reading very quietly, and then I handed the paper to him to read, and I remember asking him if he understood it, and he said he did, and that he wanted the property sold for the benefit of his wife and children. I don't remember anything else. I have a vague recollection of the whole thing.

Ques. 11. Did you see him sign the power?

Answer. Yes, sir.

Ques. 12. What did he write as his signature?

Answer. At first, when he signed it, he wrote his name. I remember his adding something, I forget what it was, and I asked him if that was his full name. I forget what his explanation was, but I re-
member I said he had to write his name simply, or it would
70 invalidate the power.

Ques. 13. I do not think it was "esquire." He appended something to his name.

Ques. 14. Was not that something erased?

Answer. Yes, sir. My recollection is, and I am pretty clear in it, is that he signed his real name above his name with that addition, and that the erasure was after he had signed his name properly, but no erasure after the act of acknowledgment.

Ques. 15. But was not the name, as it finally stood on the instrument, written in whole or in part, upon the spot erased?

Answer. No, sir. I am pretty sure it was not.

Ques. 16. Then he did not write his signature right at first?

Answer. No, sir.

71 Question 17. What is your impression as to the nature of the first signature which was erased?

Answer. My impression is that it was another name—not esquire, nor any title; some other name.

Ques. 18. You were in the habit at that time of taking many acknowledgments daily, and of reading instruments to parties?

Answer. Yes, sir. I generally read power of attorney or any thing of that kind to the parties, or asked them if they understood the contents.

Question 19. Did you not confine yourself to parties who were not likely to be familiar with the instrument?

(Objected to by Mr. Parsons, on the ground that the inquiry is to the paper now in controversy.)

Answer. Circumstances would govern me in this.

Question 20. Did you not read and explain this paper to
72 Mr. Hall because you supposed at the time that his mind was weak?

Answer. I have no doubt that I was particular to explain it to him, from the fact that he was in the asylum.

Ques. 21. How did you know that the gentleman introduced to you by Mr. Cuyler was the brother-in-law of Mr. Hall?

Answer. By Mr. Cuyler's introduction as such. I have not seen him since.

Ques. 22. Apart from the fact that Exhibit A. E. S. purports to be a certified copy of a paper filed in San Francisco, can you say, upon your oath that Exhibit A is a copy of the paper Mr. Hall signed?

Answer. I cannot. JOHN BROADHEAD.

The defendants then offered in evidence the power of
73 attorney from Mary K. Hall to James W. Harris. The plaintiffs objected to such introduction as irrelevant and not properly proven. The court overruled the objection and admitted the same, not as a power of attorney, but for any other purpose; to which ruling plaintiffs excepted, and the counsel for defendant then read the same in evidence, which is as follows, and is on the same sheet of paper with the afore-mentioned and set out power of attorney of John Hall to James W. Harris, to-wit:

Know all men by these presents, that I, Mary K. Hall, the wife of John Hall, who has signed and sealed the within written letters of attorney unto James W. Harris, and for his true and lawful attorney in fact with powers as therein expressed in relation to three several lots or pieces of ground at San Francisco, in the State of California, and numbered on the plan of the one hundred vara survey of the town of San Francisco respectively with the numbers eighty-nine, one hundred and ten, and one hundred and fifteen, to wit, among other things with power to make sale of each and of all of said lots of ground, and to execute for the same unto the pur-
74 chaser or purchasers thereof, good, valid, and effectual conveyances and assurance of title in the law, and with general powers also of disposition of and control over the said lots and each of them with power also to substitute under them, an attorney or attorneys.

Now, therefore know, that I, the said Mary K. Hall, have, in like manner and with like powers, constituted and appointed and united in the constitution and appointment of the said James W. Harris, attorney, for the several purposes and with the several powers in the said letter of attorney expressed, giving and granting unto the said James W. Harris by these presents, with precisely one same effect, and precisely to the same extent as if I had originally, as the wife of the said John Hall, united in the execution of the said letter of attorney, and especially with such effect that the said James W. Harris, or his substitute, acting under and in execution of the said letter of attorney, and this writing shall have power to give and grant unto the purchaser of all or either of said lots of ground a title to the

same wholly free and discharged of all right or claim of dower, or other claim or right whatsoever on my part.

75 Witness my hand and seal this third day of January, A. D. 1853.

[SEAL.] MARY K. HALL.

In our presence—

JOHN BRODHEAD.

WILLIAM A. HARTLEY.

STATE OF PENNSYLVANIA,

County of Philadelphia, ss:

Be it remembered that on this third day of January, anno Domini one thousand eight hundred and fifty-three, before me, John Brodhead, a commissioner resident in Pennsylvania, duly appointed by governor of California, to take acknowledgment of deeds, powers of attorney, &c., personally appeared the within-named Mary K. Hall, wife of John Hall, also within named, and she being known to me to be the individual described and who has executed the within written power of attorney, and I having first made known unto her the contents thereof, she did on a private examination before me, separate and apart from her said husband, acknowledge that she signed, sealed, and delivered the same as her voluntary act and deed freely

76 and without any fear, threat, or compulsion of her said husband.

In testimony whereof, I have hereunto set my hand and official seal, this the third day of January, A. D. 1853.

[SEAL.] JOHN BRODHEAD,

A Commissioner for the State of California,

155 *Walnut street.*

Liber 3, powers of attorney, pages 152, 153, 155. Recorded at request of James Noyes and Barber.

April 5, 1853, at 3½ p. m.

JOHN A. CLARK,

Dep. Co. Recorder.

The defendants then called Dr. S. F. Elliott, of San Francisco, who testified that he was a physician and had been in practice for twenty years and was still in practice, and is now health-officer of the port of San Francisco.

He further testified that he had read carefully all the testimony in this case relating to the sanity and insanity of John Hall.

77 Counsel for defendants then asked the witness the following question: "From the facts stated in these depositions, and the symptoms stated, what, in your opinion, was the state of John Hall's mind in December 27, 1852, as to sanity or insanity?" To which question plaintiffs objected to witness expressing any opinion founded upon the testimony adduced on the part of both plaintiffs and defendants. The court sustained the objection, but allowed the wit-

ness to give his opinion upon the testimony adduced by plaintiffs, and defendants then and there excepted.

The defendants then proved, by the testimony of this witness and of doctors Henry Gibbons, Arthur B. Stout, John F. Morse, Charles F. Berdarty, and F. A. Holman, who severally stated that they had read and carefully considered all the facts and symptoms detailed by plaintiffs' witnesses as to the sanity or insanity of John Hall, from the year 1850 to the time of his death in 1860, and that in their opinion as medical men of large experience in the practice of their profession, from said facts and symptoms, John Hall was ca-
78 pable of doing business and of executing a power of attorney before, at, and after the date of the power of attorney from John Hall to James W. Harris, and during said time may have had lucid intervals. And that in cases of the kind indicated by the testimony of plaintiffs, it is usual for the patient to have lucid intervals, and that such a case as John Hall's appears to be from the testimony rarely occurs, if ever, without lucid intervals.

The plaintiffs then requested the court to give the following instructions to the jury:

1st. A lunatic or insane person, being of unsound mind, is incapable of executing a contract, deed, power of attorney, or any other instrument requiring volition and understanding.

2nd. A power of attorney executed by an insane person, or one of unsound mind, is absolutely void.

3rd. It does not require a person to be totally deprived of reason and understanding to be of unsound mind. A person may have some mind, some intelligence, and yet not that degree of mind or intelligence necessary to the execution of a power of attorney.

79 4th. Competency to execute a deed or power of attorney does not exist unless the person executing the same has reason and understanding sufficient to comprehend such an act.

5th. A single delusion may be of such a character and may engross the mind to such an extent as to render a man completely insane and unfit to execute any transaction of business.

6th. A single delusion may be so firmly seated and may be of such a character as to render the person incapable of contracting.

7th. If plaintiffs have established that John Hall was insane and of unsound mind at a short period previous to, and at a short period subsequent to, December 27, 1852, then the defendants, to avail themselves of the power of attorney executed on that date, must establish by full and complete proof that such power of attorney was executed while said John Hall had a lucid interval; that is, the burden of proof under the circumstances is upon the defendant.

8th. John Hall may have had on the 27th December, 1852, a remission of his alleged general insanity without having a lucid interval.

80 9th. The proof to establish a lucid interval, or a return to reason after a habitual insanity has been established, should be as clear and demonstrative as proof to establish insanity; and it is not sufficient for the defendants to show he might have had lucid

intervals or that he did have lucid intervals, but they must show a lucid interval existed on the day of the execution of the power of attorney.

10th. To constitute a lucid interval, John Hall must have had reason and understanding sufficient to comprehend the nature and effect of the power of attorney he is said to have signed.

11th. When the fact of habitual insanity has once been shown, the law presumes its continuance until the contrary is proved by evidence.

12th. If John Hall was insane or non compos mentis at the time of the execution of his power of attorney, no title passed under it, and the plaintiffs are entitled to recover.

13th. To determine whether John Hall was insane or non compos mentis, the jury may enquire as to the state of his mind prior
81 to, at the time of, and subsequent to the execution of the power of attorney. Their investigation need not be limited to the exact day of the execution of the power.

14th. If lunacy be established by the proof and within a short period prior and subsequent to the execution of the power, lunacy at the time of the execution should be and is inferred, unless the defendants establish a lucid interval at the time of such execution.

15th. In determining whether John Hall was a lunatic or not, one test to be applied in the existence in his mind of delusions.

If the jury believe he was afflicted with serious and varying delusions existing for many months prior to the execution of the power, and that he was, because of insanity, confined in a lunatic asylum, the existence of such delusions and the fact of such imprisonment are together prima faciæ evidence of insanity.

16th. To render a man non compos mentis, it is not necessary that he should conduct himself violently nor in a furious manner, nor that he should be destitute of understanding. He may be able to
82 understand all that is said to him; may give intelligible answers, and during a protracted interview may give no outward indications of insanity, and yet be insane and unable to transact business.

17th. There is a distinction between a remission of the violence of a paroxysm of madness and a lucid interval. In the former case there is a subsidence of the more acute and violent symptoms. The patient may be tranquil, and conduct himself with much apparent intelligence, yet, owing to the delusive sources of his thought, he may be of unsound mind. The diseases of the mind exists, although its evidences are less apparent. A lucid interval is a return to reason, and the patient will then be conscious of his former delusions, and acknowledge them to be such.

18th. A good proof of the evidence of a lucid interval in the case of John Hall would be the testimony of the physicians who had him under treatment.

The fact that the defendants appeared by counsel, and yet declined to cross-examine them on this point, so vital to their case, is

83 a significant fact, to the benefit of which the plaintiffs are entitled.

19th. The testimony of the witness, Brodhead, should be carefully weighed; for if John Hall was insane at the time of the execution of the power, and Brodhead knew the fact, his position was such as to detract from his credibility as a witness.

20th. If you believe that John Hall did not at first sign his own name to that power of attorney, but another name, as testified by Broadhead, and if you find that previously to such execution he was generally insane, and if you find that he executed that power of attorney in a lunatic asylum, and if you find that, prior to such execution, one of his delusions was that he was some person other than John Hall, then the signing of another name than his own by a person having such delusion, and circumstanced as he then was, is itself evidence of insanity.

Which instructions were given by the court, as requested, to which action and ruling of the court defendants then and there excepted.

The defendants then requested the court to give the follow-
84 ing instructions to the jury:

1. If the jury believe from the testimony that the mind and memory of John Hall, deceased, was sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed his power of attorney which is in evidence, then the same was valid and binding, and the jury must find for the defendants.

2nd. If the jury believe from the evidence that the deceased, John Hall, at the time of executing the power of attorney in evidence before them, had mind and memory sufficient to understand and comprehend the nature and character of the business he was engaged in and the objects of the provision contained in his power, the jury must find for the defendants.

3rd. If the said John Hall, at the time of the execution of the said power of attorney, understood the nature of the instrument he was executing, and the effect of the language used to express his intention, it was sufficient to render the same valid.

85 4th. Mere weakness or inability of mind, however great, is not sufficient in itself to set aside or invalidate the power; but the unsoundness of mind sufficient to invalidate should be of such degree as to render the said Hall for the time being incapable of understanding that he was engaged in executing an instrument authorizing the sale of his property and the object and purpose intended.

5th. If the jury find from the evidence that the said John Hall, at the time of the execution of the said power of attorney in evidence, was labouring under partial insanity only; that is, he was insane upon one or more subjects, and rational on all others, this will not be sufficient to invalidate his said power, unless the jury are satisfied that the power was the direct offspring and result of one or more of the delusions under which he was labouring.

6th. Unless the jury find that the said John Hall, deceased, at the time of the execution of the said power of attorney, had not
86 mind and memory enough to know what he was doing, and the effect of the provisions of the said power, they will find a verdict for the defendant.

7th. The jury are bound to presume that John Hall, deceased, was of sound mind and capable of directing the sale of his property by power of attorney at the time the said power was executed, unless from the evidence in the cause they find that he was insane and totally deprived of his reason, and that said power of attorney was executed while in that condition.

8th. Mere weakness or imbecility, however great, on the part of the said John Hall at the time of the execution of the said power of attorney, is not sufficient to avoid it; the jury must be satisfied that there was a total want of reason at that time.

9th. The law presumes every man to be sane, and the burden of proof is upon the party averring insanity.

10th. Previous habitual or continuous insanity alone will change the burden of proof.

87 11th. The deeds, contracts, &c., of an insane person are only voidable, and not absolutely void; and if the jury find from the evidence that the said John Hall, at the time of the execution of the said power of attorney, was insane and totally deprived of his reason, and if the jury also find that the defendants, now in possession of the premises in controversy, have purchased the same in good faith for a valuable consideration, and without notice of said supposed insanity of said John Hall at the time of the execution of said power of attorney, then the jury will find for the defendants.

12th. The acts of an agent in the execution of a power are not, in all cases, to be avoided on account of the incapacity of the principal. If the principal has enabled the agent to hold himself out as having authority by a written letter of attorney, and the incapacity of the principal is not known to those who deal with the agent within the scope of the authority he appears to possess, the transactions are valid and binding upon the principal.

88 13th. If the jury find that the said John Hall, at the time of the execution of the said power of attorney, was capable of recollecting the property and the manner of its disposition, and the objects of the power and persons for whose benefit he was executing the power, it is enough, and the jury will find for the defendants.

14th. If the jury believe from the evidence that John Hall, at the time of the execution of the said power of attorney, fully understood and intended to make the disposition of his property contemplated and provided for by the power, then the said power was valid and binding, and the jury must find for the defendants.

15th. The evidence showing insanity on the part of John Hall, at the time of the execution of the power of attorney, must preponderate, or the legal presumption of sanity must prevail, and the plaintiff, alleging such insanity, must show it by such preponderance of testimony.

89 16th. If the power of attorney was executed by John Hall during a lucid interval, it was valid and binding, and the jury will find for the defendants.

17th. If John Hall, at the precise time of the execution of the said power of attorney, understood what he was doing, and was competent to that particular act, then the said power was valid and binding.

The court gave all of the above instructions requested, excepting the seventh, the eleventh, the twelfth, and the fifteenth, and the last paragraph of the eighth. The court refused these instructions and the last paragraph of the eighth instruction, and the defendants' counsel then excepted to the refusal. The twelfth instruction was refused, as stated by the court at the time, because of its generality; and the fifteenth instruction was refused for the reason given at the time, that the correct rule as to the legal presumption was stated in the charge to the jury.

90 The court then delivered the following charge to the jury:

GENTLEMEN OF THE JURY: This is an action of ejectment to recover the possession of a 100-vara lot, situated on the northerly side of Bryant street, near First street, in this city. The plaintiffs claim the property as the heirs of John Hall, deceased. In support of their claim they have produced a grant of the premises issued to Hall by Alcalde Leavenworth, on the 30th of December, 1848, and have proved its genuineness and due execution; they have shown the marriage of Hall with their mother Mary K. Hall, and that they are the children of this marriage. John Hall died in September, 1860, and Mary K. Hall has died during the pendency of the present action. At the death of their father the plaintiffs were all minors, the eldest being twenty years, and the youngest nine years of age. The property granted, assuming that the grant was valid, was the separate property of Hall, and by the law of descents and distributions of this State whatever interest he then possessed passed upon his death, one-third to his surviving wife, and the remainder in equal shares to the children. On the death of the wife, her interest also went to the children, so that now the entire estate, which he possessed in this property at his decease, assuming that he possessed any, is vested in the plaintiffs.

It is not necessary to consider whether originally American alcaldes in the city of San Francisco, after the cession of California to the United States, possessed any power to make grants of land. So far as this case is concerned, it is immaterial whether they did or did not possess such power. The subsequent action of the authorities of the city of San Francisco, and the confirmatory legislation of the State, together with the action of Congress, have given to the holders under alcalde grants, recorded like the one in suit, an absolute and indefeasable estate, even if they acquired originally no title whatever by the grants.

By the ordinance of the common council of the city of San Francisco, commonly designated, from the name of its reputed author, the

Van Ness Ordinance, the city relinquished and granted all her right and claim to the lands within her corporate limits, as defined by the charter of 1851, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855; provided such possession was continued up to the time of the introduction of the ordinance into the common council, or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process; but at the same time the ordinance declared that all persons who held title to lands within said charter limits, lying east of Larkin street and northeast of Johnson street, by virtue of any grant made by any ayuntamiento, town council, or alcalde of the pueblo, after the seventh of July, 1846, and before the incorporation of the city, which grant, or the material portion thereof, was registered or recorded in a proper book of records—deposited in the office or custody or control of the recorder of the county of San Francisco—on or before April 3d, 1850, should for all the purposes contemplated by the ordinance "be decreed to be possessors of the land" granted, although the land might be in the actual occupancy of persons holding the same adverse to the grantees.

In other words, the ordinance declared that the title of the city, whatever it may have been, should go to the parties in actual possession at a designated period, and that the holders under alcalde grants, which were, previous to April 3, 1850, registered or noted in books deposited in the recorder's office, should be deemed such possessors for the purposes of the ordinance.

In this case it has been shown that the grant was registered in a proper book at the time or soon after its execution, in 1848, and that this book was deposited in the office of the recorder on its establishment in April, 1850.

The Van Ness ordinance did, therefore, if it were valid, transfer to and vest in John Hall (had he not previously disposed of the premises) all the right and title of the city.

But lest the action of the common council, in passing this ordinance, might have been in excess of their authority, application was made to the legislature of the State for its confirmation, and on the 11th of March, 1858, the legislature ratified and confirmed it.

But notwithstanding this legislation, there were numerous persons—some of them among our ablest lawyers—who denied that there was any title in the city which she could relinquish, and insisted that all the lands within the corporate limits belonged to the United States. The framers of the ordinance also appear to have entertained some doubts on this subject, for they provided in the tenth section that application should be made, not merely to the legislature of the State for confirmation, but to Congress "to relinquish all the right and title of the United States to the said lands for the uses and purposes" mentioned in the ordinance.

Affected by similar doubts, and in order to give quiet and security to the parties holding under the Van Ness ordinance, one of our senators introduced a bill into Congress containing a clause relating to these lands. The bill became a law on the 1st of July, 1864, and by

it all the right and title of the United States to lands within the corporate limits of the city, as defined by the charter of 1851, with certain reservations not material to this case, were ceded to the city and its successors for the uses and purposes specified in the Van Ness ordinance.

Thus, gentlemen, you will preceive that all the possible sources of title to lands, namely the city as successor of the pueblo, the State, and the United States, have united to vest an absolute and indefeasible estate in the claimant under the alcalde grant in question.

The defendants being in possession of the premises when this action was instituted, the case of the plaintiffs is thus prima facie made.

91

92 To meet the case thus presented, the defendants have produced and given in evidence a power of attorney, purporting to be executed by John Hall, on the 27th of December, 1852, to one James W. Harris, empowering him to sell and convey the real property in controversy, and also to appoint a substitute to act for him. This power bears a certificate of due acknowledgment before a commissioner of California, resident in Pennsylvania. They have also produced a substitution of the power to one David B. Rising, and a conveyance of the premises by Rising, acting under this substitution, to Daniel D. Page, under whom they claim.

This power the plaintiffs assail, contending that, at the time it purports to have been executed, Hall was insane, and incapable, by reason of his insanity, from attending to any business.

Gentlemen, I do not propose to attempt any nice or philosophical exposition of the subject of insanity. I should certainly fail if I made the attempt; and if I could succeed, the result would not be of any service to you in determining this case. Any elaborate and extended dissertation, it it were possible for me to present such a one, would only tend to perplex and confuse your minds. I shall make a few plain observations on this subject, and refer to the rules laid down by the authorities to guide you in considering it, and then call your attention briefly to the evidence in the case.

The physicians who have been examined, and the text writers, declare that it is impossible to give any consistent definition of insanity; that no words can comprise the different forms and characters which this malady may assume. The most common forms in which it presents itself are those of mania, monomania, and dementia. All these imply a derangement of the faculties of the mind from their normal or natural condition. Idiocy, which is usually classed under the gener: designation of insanity, is more properly the absence of mind than the derangement of its faculties; it is congenital, that is, existing at birth, and consists not in the loss or derangement of the menta powers, but in the destitution of powers never possessed.

Mania is that form of insanity where the mental derangement i accompanied with more or less of excitement. Sometimes the excitement amounts to a fury. The individual in such cases is subject to hallucinations and illusions. He is impressed with the reality of events which have never occurred, and of things which do not exist, and acts

more or less in conformity with his belief in these particulars. The mania may be general and affect all or most of the operations of the mind; or it may be partial, and be confined to particular subjects. In the latter case it is generally termed monomania.

Dementia is that form of insanity where the mental derangement is accompanied with a general enfeeblement of the faculties. It is characterized by forgetfulness, inability to follow any train of thought, and indifference to passing events. "In dementia," says Ray, a celebrated writer on medical jurisprudence, "the mind is susceptible of only feeble and transitory impressions, and manifests but litte reflection even upon these. They come and go without leaving any trace of their presence behind them. The attention is incapable of more than a momentary effort, one idea succeeding another with but little connection or coherence The mind has lost the power of comparison, and abstract ideas are utterly beyond its grasp. The memory is peculiarly weak, events the most recent and most nearly connected with the individual being rapidly forgotten. The language of the demented is not only incoherent, but they are much inclined to repeat insulated words and phrases without the slightest meaning."

These common forms of insanity, mania, monomania, and dementia, present themselves in an infinite variety of ways, seldom exhibiting themselves in any two cases exactly in the same manner. Mania sometimes affects, as already observed, all the operations of the mind; and sometimes the mental derangement appears to be limited to particular subjects. An absence of reason on one matter, indeed on many matters, may exist, and at the same time the patient may exhibit a high degree of intelligence and wisdom on other matters. The books are full of such cases. Many of them have been cited to you by counsel on the argument. They show, indeed, a want of entire soundness of mind; they show partial insanity, but this does not necessarily unfit the individuals affected for the transaction of business on all subjects. In a case which arose in the Prerogative Court of England, (Dew *vs.* Clark, 3 Addams Eccl. R., 79,) it was said by counsel that partial insanity was something unknown to the law of England. To this suggestion the court replied: "If he meant by this that the law of England never deems a person both sane and insane at the same time upon one and the same subject, the assertion is a mere truism. But if by that position it be meant and intended that the law of England never deems a party both sane and insane at different times on the same subject, and both sane and insane at the same time on different subjects, there can scarcely be a position more destitute of legal foundation, or rather there can scarcely be one more adverse to the current of legal authority." In that case the court cited the language of Locke, that "a man who is very sober and of a right understanding in all other things, may, in one particular, be as frantic as any man in Bedlam," and of Lord Hale, who says, "There is a partial insanity of mind and a total insanity; in the first, as it respects particular things or persons, or in respect of degrees, which is the condition with very many, especially melancholy persons, who, for the most part discover their defect in excessive fears and grief, and yet are not wholly destitute of the use of reason."

So, too, in dementia, where there is a general enfeeblement of the mental powers, there is not usually weakness exhibited on all subjects, nor in all the faculties. Those matters which, previous to the existence of the malady, the patient frequently thought of and turned over in his mind, are generally retained with greater clearness than less familiar objects. One faculty may be greatly impaired—the memory for example, while other faculties retain some portion of their original vigor. The disease is of all degrees, from slight weakness to absolute loss of reason. The enfeeblement usually progresses gradually through a twillight, as it were, of reason, before the darkness of night settles upon the mind.

It is important to bear these observations in mind, for it does not follow from the fact that mania or dementia be shown, that there may not be reason or capacity for business on some subjects. In determining the ability of the alleged insane person to execute any particular act, the inquiry should first be, what degree of mental capacity is essential to the proper execution of the act in question; and then whether such capacity was possessed at the time by the party. It is evident that a very different degree of capacity is required for the execution of a complicated contract, and a single transaction of a simple character, like the purchase or sale of a lot.

93

94 The act done in the case at bar was the execution of a power of attorney to sell three lots in San Francisco.

The act required no greater exercise of reason than is essential to the valid execution of a will of real property; and the authorities which determine the degree of capacity essential in such cases may properly be relied upon as furnishing the proper rule in this case. And those authorities concur, especially the later authorities, substantially in this, that it is only necessary to the validity of the will that the testator had sufficient mind and memory to understand the business upon which he was engaged, and the effect of the act he was doing. "He must," in the language of Judge Washington, in Harrison *vs.* Rowan, (3 Wash., Cir. Ct., 585,) "have a sound and disposing mind and memory. In other words, he ought to be capable of making his will, with an understanding of the nature of the business in which he is engaged—a recollection of the property he means to dispose of—of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed—the distribution of his property in its simple forms. It is the business of the testator to dictate the purposes of his mind, and of the scrivener to express them in legal form."

It is true, as stated by counsel, that the authorities generally go to the extent that it requires less intelligence and reason to make a will than to execute a contract; but for the execution of an act of a simple character, not involving complicated details and provisions, the rule laid down by Judge Washington is sufficiently stringent.

According to that rule, it was material to the valid execution of the power in this case, that Hall should at the time have possessed sufficient mind and memory to understand the nature of the business he was engaged in, to know the character and location of the property, and the object and effect of the act he was doing; in other words, it was essential that he should recollect that he was the owner of the property mentioned, that such property was situated in the city of San Francisco, and that the instrument conferred authority for the sale of the same.

In considering this case, it is to be remembered that the law presumes that every adult man is sane and possessed of the absolute right to sell and dispose of his property in whatever way he may choose—his will in every case standing as the reason of his conduct. Whoever denies his sanity must establish the position; the burden of proof rests upon the party who alleges the mental derangement. And if, as in the present case, the validity of a particular act is assailed, the assailant must establish that at the time the act was done the insanity existed. Testimony as to previous or subsequent insanity will not answer, unless the insanity be shown to be habitual; that is, such as is in its nature continuous and chronic. The fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof. The case is, however, otherwise when such habitual insanity is shown to have existed—then the presumption is that the party was insane at the time and the burden of proof rests with those who allege the party's competency.

Again, in considering whether a particular act, assailed for the alleged insanity of the party, was valid or not, regard must be had, in the absence of direct testimony on the point, to all the attending circumstances—the reasonableness of the act in itself, and its approval by the family and relations of the party. The reasonableness of the act and the approval of the family and relatives will not render the act valid if the party were at the time insane, but they are circumstances tending to show that the party was not at the time incompetent, and that his family and relatives did not so regard and treat him.

In this case it appears that the lot in controversy was at the time in the adverse possession of others, and that the Supreme Court of the State had decided that alcalde grants conferred no title. A sale of his interest, if anything could be obtained for it, under the circumstances, would seem to have been a judicious and a wise step.

The only testimony which relates directly to the time of the execution of the power is that of Broadhead, the witness to the instrument, and the officer before whom it was acknowledged. It was the duty of this officer to satisfy himself of the competency of Hall before attesting the instrument. As said by the Supreme Court of Pennsylvania, in Werstlee *vs.* Custer, (10 Penn. p. 503,) "no honest man will subscribe as a witness to a will or any other instrument executed by an insane man, an imbecile, an idiot, or a person manifestly incompetent for any reason to perform, with legal effect,

the act in question. A duty attaches to the witness to satisfy himself of the competency of the party before he lends his name to attest the act. Like the magistrate who takes the acknowledgment of a deed, he is to be reasonably assured of the facts he undertakes to verify, else he makes himself instrumental in a fraud upon the public. And, therefore, the legal presumption, always favorable to competency, is greatly strengthened by the fact of attestation by witnesses."

Such is the general effect of the attestation of a witness and officer; but whether the attestation in the present case, under the peculiar circumstances in which it was made, can add anything to the legal presumption of competency may well be doubted. It is a circumstance worthy of consideration, whether the commissioner should have gone to the asylum to take the acknowledgment of an inmate of the institution, with whom he had no previous acquaintance, without information from the officers of the institution, that the patient at the time was in possession of sufficient reason to understand the business which it was proposed he should execute.

Broadhead testifies that he went to the Frankford asylum to take the acknowledgment of Hall, with whom he was not previously acquainted; that he read the power to Hall, and handed it to him to read, and asked him if he understood it; that Hall replied, "perfectly," or words to that effect; and that the property was valuable, and that he wanted it sold for the benefit of his wife and children. The commissioner also testifies that he could not have believed Hall was on all subjects of sound mind, from the simple fact that he was an inmate of the asylum, but that as to the power of attorney, Hall was clear as to what he was giving; that there was nothing in his appearance which led the commissioner to suppose he was insane, and from the fact that he stated that he wanted the property to be sold, the commissioner was led to believe he had a lucid interval. The witness adds that he would not have permitted Hall to execute the instrument, and he would not himself have taken the acknowledgment, unless Hall had been of sufficient mind, memory, judgment, and understanding to execute such a paper.

95

96 Aside from the peculiar circumstances under which the commissioner acted, there is one fact in his testimony which should be considered by you as throwing possibly some light on the condition of Hall's mind, at the time somewhat in conflict with the commissioner's own opinion. He states that Hall at first wrote something beside his signature to the instrument. The instrument itself shows that there has been an erasure of something near the signature. The commissioner states, as his impression, that Hall wrote some other name than his own. This is at least a singular circumstance, if, as stated by the commissioner, he had heard the instrument read, and perfectly understood its purport.

We will now briefly refer to the testimony produced by the plaintiffs, to show the general insanity of Hall at the time he executed the power in question. If he was then insane, and his insanity was gen-

eral, the instrument was a nullity, and no title could be transferred under it. In that case the plaintiffs are entitled to a verdict. It matters not, if such were the case, what consideration may have been paid to the attorney, or with what good faith the parties may have purchased. The instrument, in such case, is no more to be regarded as the act of John Hall than if he was dead at the time of its execution.

It appears from the testimony produced by the plaintiffs that John Hall was a lieutenant in the United States navy, and at one time had the command of a vessel-of-war; that he was, in 1848, on this coast; that whilst here the alcalde grant was issued to him; that in 1849 he became unwell, and his health was so much affected that he was sent to the eastern States under the charge of a physician; that he arrived in New York and joined his family in June, 1849; that he remained with his family until June, 1851—two years; that during this period there were such indications of insanity that upon the advice of his consulting and family physicians he was sent to the asylum at Frankford; that he remained there, under treatment for insanity, until January 25, 1854, when he was removed to the State Insane Asylum; and that he died an inmate of this latter institution in September, 1860.

The witnesses produced by the plaintiffs are either the physicians attending or persons immediately surrounding Hall both before his entry into the asylum and afterward. The testimony discloses the possession by him of hallucinations and illusions on many subjects. Mr. Wright states that whilst in New Jersey, after his return, he was at times greatly incensed at his neighbors, asserting that they had destroyed his garden—which they had not—and complained of noises in his ears, which he said arose from a train of cars running through his head.

Miss Harris testified that he was subject to fits of abstraction; had strange fancies; thought he had been to heaven, and said so, and finding his wife was not there, had returned; that he complained much of confusion in his head, and thought trains of cars were running through it; and would object to a light in the evening as being painful to his head and setting it on fire; that he would work in his garden sometimes for a whole day without food, giving as an excuse that he was obliged to do so for his living; that he would plant vegetables and flowers and soon dig them up, and then charge his neighbors with killing his plants; he would get excited and threaten to shoot any one who came on his place; that there was a spring of water in the cellar which was drained through a vacant lot, and that he at one time took a fancy to fill up the drain, and then when the water rose he spent hours in trying to bail it out. He did this repeatedly. He would fill up the drain in the daytime, and his wife would hire a man to open it after night. When remonstrated with for his conduct, he said it was God's will it should be done. He would sometimes fancy himself the Creator, and want parties to address him as such; at other times he would use the most blasphemous language. He would buy the most unnecessary things, posts

and rails, for which he had no use. He took great dislike to certain persons, and would not permit them to come to the house. He would sometimes sit at the table, with a vacant stare, and neither eat himself or help others. He took no notice of his children and no care of his family, and before that he was a devoted husband and affectionate to his children. At times he would treat visitors very insolently, fancying they came to injure him. He would expose himself all day to the hot sun, and if called in he would say he was too busy and obliged to work. He fancied he owned everything he saw at the stores, and could not understand why he could not help himself to what he liked. After Hall was sent to the asylum, it appears that he continued subject to hallucinations. Wright testifies that it was impossible to hold any connected conversation with him, or to keep his mind centered on any one subject; that he fancied his fellow-patients were distinguished historical characters, and desired to introduce them to the witness. He had scars upon his wrists and arms, and said he had been tattooing himself, a beautiful art he had acquired at the Sandwich Islands, and desired to tattoo the witness, stating that the operation was perfectly painless. Miss Harris states that when she visited him at the asylum he imagined he was employed to fit out a fleet, and said he was oppressed with care—he was so occupied with his business.

Wistar, the steward at Frankfort asylum, from May, 1852, to September, 1853, testifies that Hall had a great many singular propensities. When awake he spent a great deal of his time in indistinct mutterings and murmurings. He had a propensity for weaving wire and fish bones into his arms and legs, through the flesh and under the skin, very much as a woman would darn a stocking. This resulted in sores, which festered and discharged. He was in the habit of heaping up his bed clothes in his bed daily in the form of a haycock or pyramid, and would then cap the same with the chamber utensil, whether it contained any contents or not. He had a fancy of putting on his clothing in a way not designed to be worn. He tore his clothing and bedding. He was very profane and obscene in his language, and spent a good deal of time in what he termed prayer, which in a sane man would have been blasphemy of the worst kind. The testimony of Mrs. Wistar is to the same effect.

Dr. Fithian, the family physician of Hall from June, 1849, until he went to the hospital, pronounces his malady insanity and says that it was accompanied with unnatural excitement, restlessness, irritability—that he was incoherent, and had want of connection of thought and expression. He adds that the disease was acute mania, rather than dementia, into which acute mania is apt to run.

Dr. Evans, who was one of the physicians of Hall, both before and after he was at the asylum, states as his recollection of the disease, that he was laboring under chronic inflammation of the menges of the brain producing mania, and resulting in dementia, and that whilst at the asylum he gradually deteriorated and grew worse, and that he (the doctor) considered him hopelessly insane.

98 Dr. Worthington, the medical superintendent, pronounces the disease of Hall mania, with a tendency to dementia, and states that he had various delusions, and among others believed he was the Son of God.

I have stated the most important matters testified to by the witnesses, from which you must draw your conclusions as to the sanity or insanity of Hall at the time the power was executed. I do not refer to the testimony as to Hall's condition after his removal from the asylum at Frankfort to the State asylum. It is not pretended that after that period he was possessed of lucid intervals; but, on the contrary, he gradually sank from one degree of weakness to another until his death.

You will perceive that the physicians of Hall state that the malady of which he was suffering was originally acute mania, and that it ended in dementia. You will observe that he was affected by similar hallucinations and illusions both before and after he went to the asylum; and you will remember, as already stated, in speaking of mania, that it is characterized by hallucinations or delusions—the patient believing and acting upon the supposed reality of facts and events which have never occurred or do not exist. The testimony of all the witnesses is that the malady from the commencement continually increased, the patient gradually sinking from one degree of enfeeblement to another. Now, there may have been lucid intervals with the patient, arising from an intermission in the operation of the disease. If there was any such intermission and consequent lucid interval in this case, it is for you to determine. In considering this matter, you will remember that the malady in this case arose from a disease of the lining membrane of the brain, from what Dr. Evans designates chronic inflammation of the menges of the brain; that it had continued with more or less intensity for over three years when the power of attorney was executed. If, therefore, you should come to the conclusion that he was, as asserted by his physicians, insane before he entered the asylum, and that his malady continued to grow worse afterward, you will be justified in finding that it had attained that character which the books designate as habitual insanity, which is continued and settled derangement. If you come to this conclusion you will then look for proof of his having had a lucid interval when he executed the power. The burden of proof, in that event, that is to say, if habitual insanity be established, lies upon the party who alleges that a lucid interval existed.

Several very able physicians in this city have been called to state their opinions founded upon the evidence of the plaintiffs—that of Broadhead being excluded—as to the probability of lucid intervals in the condition in which Hall is shown to have been. They all express the opinion that such lucid intervals were probable; indeed, their testimony goes so far as to state that in their judgment his insanity was not, previous to 1853, of that severe and general character as to render him at all times incapable of transacting business on some subject.

I will only observe that the opinions of physicians are received in

evidence from their superior knowledge of matters connected with their profession. It would be difficult to present in an intelligible way to a jury all the grounds upon which learned professional men may base their judgments. The law, therefore, allows their judgment to be received; but at the same time, where professional men are of equal standing and intelligence, it awards much higher consideration to those opinions which are based upon personal observation and examination of the patient.

The case, gentlemen, is one of great interest, and is of much importance to the parties. It has been tried with great ability by counsel, and I doubt not that after the patient consideration which you have given to their arguments and to the evidence, you will, under the instructions of the court, readily reach a wise and just verdict.

To the following portions of which charge the defendants
99 then and there excepted:

100 1. At the death of their father the plaintiffs were all minors, the eldest being twenty years and the youngest nine years of age. The property granted, assuming that the grant was valid, was the separate property of Hall, and by the law of descents and distributions of this State whatever interest he then possessed passed upon his death, one-third to his surviving wife, and the remainder in equal shares to the children. On the death of the wife, her interest also went to the chilren, so that now the entire estate which he possessed in this property at his decease, assuming that he possessed any, is vested in the plaintiffs.

It is not necessary to consider whether originally American alcaldes in the city of San Francisco, after the cession of California to the United States, possessed any power to make grants of land. So far as this case is concerned, it is immaterial whether they did or did not possess such power. The subsequent action of the authorities of the city of San Francisco, and the confirmatory legislation of the State, together with the action of Congress, have given to the holders under alcalde grants, recorded like the one in suit, an absolute and indefeasable estate, even if they acquired originally no title whatever by the grants.

By the ordinance of the common council of the city of San Francisco, commonly designated, from the name of its reputed author, the Van Ness ordinance, the city relinquished and granted all her right and claim to the lands within her corporate limits, as defined by the charter of 1851, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855; provided such possession was continued up to the time of the introduction of the ordinance into the common council, or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process; but at the same time the ordinance declared that all persons who held title to lands within said charter limits, lying east of Larkin street and northeast of Johnston street, by virtue of any grant made by any ayuntamiento, town council, or alcalde of the pueblo, after the seventh of July, 1846, and before the incorporation

of the city, which grant, or the material portion thereof, was registered or recorded in a proper book of records—deposited in the office, or custody, or control of the recorder of the county of San Francisco—on or before April 3d, 1850, should, for all the purposes contemplated by the ordinance, "be decreed to be possessors of the land" granted, although the land might be in the actual occupancy of persons holding the same adverse to the grantees.

2. The fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof. The case is, however, otherwise when such habitual insanity is shown to have existed; then the presumption is that the party was insane at the time, and the burden of proof rests with those who allege the party's competency.

3. Such is the general effect of the attestation of a witness and officer; but whether the attestation in the present case, under the peculiar circumstances in which it was made, can add anything to the legal presumption of competency may well be doubted. It is a circumstance worthy of consideration, whether the commissioner should have gone to the asylum to take the acknowledgment of an inmate of the institution, with whom he had no previous acquaintance, without information from the officers of the institution, that the patient at the time was in possession of sufficient reason to understand the business which it was proposed he should execute.

4. He states that Hall at first wrote something besides his signature to the instrument. The instrument itself shows that there has been an erasure of something near the signature. The commissioner states, as his impression, that Hall wrote some other name than his own. This is at least a singular circumstance, if, as stated by the commissioner, he had heard the instrument read, and perfectly understood its purport.

5. At the time he executed the power in question, if he was then insane, and his insanity was general, the instrument was a nullity, and no title could be transferred under it. In that case the plaintiffs are entitled to a verdict. It matters not, if such were the case, what consideration may have been paid to the attorney, or with what good faith the parties may have purchased. The instrument, in such case, is no more to be regarded as the act of John Hall than if he was dead at the time of its execution.

6. If, therefore, you should come to the conclusion that he was, as asserted by his physicians, insane before he entered the asylum, and that his malady continued to grow worse afterward, you will be justified in finding that it had attained that character which the books designate as habitual insanity, which is continued and settled derangement; if you come to this conclusion, you will then look for proof of his having a lucid interval when he executed the power. The burden of proof, in that event—that is to say, if habitual insanity be established—lies upon the party who alleges that a lucid interval existed.

7. I will only observe that the opinions of physicians are received in evidence from their superior knowledge of matters connected with

their profession. It would be difficult to present in an intelligible way to a jury all the grounds upon which learned professional men may base their judgments. The law, therefore, allows their opinions to be received; but at the same time, where professional men are of equal standing and intelligence, it awards much higher consideration to those opinions which are based upon personal observation and examination of the patient.

101 And thereupon the case went to the jury, who returned a verdict for the plaintiffs.

And the defendants did then and there propose their aforesaid bill of exceptions to the judge of said court, and asked that the same be allowed, signed, and sealed, which is done accordingly.

August 9th, 1867.

[L. S.] STEPHEN J. FIELD,
Circuit Judge.

Endorsed: Filed August 9, 1867. Geo. E. Whiting, clerk. By S. Neal, D. C.

102 UNITED STATES OF AMERICA, *ss:*

To J. Latson Hall, Mary K. Hall, (the younger,) Hettie W. Hall, and Jane H. Hall, (a minor,) and Philip J. Galpin, guardian at litem, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, in the district of Columbia, on the first Monday of December, A. D. 1867, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the district of California, wherein Henry S. Dexter is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

November 8th, 1867.

STEPHEN J. FIELD,
Associate Justice of U. S. Supreme Court.

Endorsed: Service of the within hereby admitted, this 8th day of November, A. D. 1867. H. & C. McAllister, for pl'ffs below and def'ts in error. Filed 8 Nov., 1867. Geo. E. Whitney, clerk.

103 The foregoing pages, 1 to 102, both inclusive, constitute the return of the judges of the Circuit Court aforesaid to the annexed writ.

GEO. E. WHITNEY, *Clerk.*

BRIEF AND POINTS.

SUPREME COURT OF THE UNITED STATES.

HENRY S. DEXTER, PLAINTIFF IN ERROR,

vs.

J. LADSON HALL, HETTY W. HALL, and by GUARDIAN, JANE H. HALL, DEFENDANTS IN ERROR.

ROSCOE CONKLING, of Counsel for Plaintiff in Error.

ROBERTS, Printer, 60 Genesee St., Utica, N. Y.

SUPREME COURT

OF THE

UNITED STATES.

SUPREME COURT OF THE UNITED STATES.

HENRY S. DEXTER, Plff. in Error,

vs.

J. LADSON HALL, HETTY W. HALL, and by GUARDIAN, JANE H. HALL, Defts. in Error.

Points, &c., for Plaintiff in Error.

This was an action of Ejectment arising upon the following

FACTS.

On the 30th of December, A. D. 1848, one John Hall, then a Lieutenant in the Navy, and a resident of the State of New Jersey, obtained from one T. W. Leavenworth, who was then an Alcalde of the District of San Francisco, in Upper California, a grant of a lot of ground lying in the Southern vicinity of the town of San Francisco, said lot being one hundred varas square, and numbered eighty-nine (89) on the plan of the one hundred vara survey, which lands were afterwards included within the chartered limits of the city, and were situated east of Larkin Street and north of Johnston Street. (Error Book, fols. 45, 49, 50, 60.)

On the 27th of December, A. D. 1852, John Hall, who had returned East in the summer of 1849, (fol. 50,) executed a Power of Attorney to one James W. Harris, his brother-in-law, (fol. 63,) to sell these and other lands, which power is set forth at folios 53 to 56 inclusive: And on the 3d day of January, A. D. 1853, Mary K. Hall, the wife of John Hall, and one of the plaintiffs below, executed a like Power of Attorney to said Harris, which was written on the same sheet with her husband's power, and both of which were recorded April 5, 1853. (Fols. 73 to 76.)

At some time subsequent to the execution of these powers of Attorney, and prior to September 22, 1853, (but at what time does not appear,) Harris, the Attorney, substituted one David B. Rising as such Attorney, and he conveyed the lot in question, and the same passed by mesne conveyances to Daniel D. Page, who on the 22d of September, 1853, conveyed it to the Plaintiff in Error, (Dexter,) and one Morse, for the consideration of $30,000, which they paid. (Fol. 58.)

When Dexter and Morse purchased, in 1853, the lot was enclosed by a substantial picket fence, and had upon it a valuable house, built by Daniel D. Page, and occupied by one Hemenway as a tenant under Page, and who continued to occupy as tenant under Dexter and Morse. (Fol. 58.)

Dexter retained his portion of the lot entire until 1860, when he sold portions of it to different persons who at once took possession, and some of whom commenced building on their lots. (Fol. 59.)

At the commencement of the action, Dexter owned and was in possession of only a portion of the lot which is described in the answer. (Fols. 20, 21, 49, 50.)

John Hall died in September, 1860, intestate, leaving the plaintiffs below, his widow and heirs-at-law, him surviving. (Fols. 50 and 90.)

James L. Hall, the son, and one of the plaintiffs below, was born August 27th, 1839, (fol. 50,) and was consequently twenty-one years of age on the 27th of August, 1860, and before his father's death.

On the 28th of March, 1866, the plaintiffs caused a written demand of possession to be served on the defendants, and sometime in April, 1866, this action was commenced. (Fols. 2, 3, and 49.)

The plaintiffs were all residents of Pennsylvania at the time of the commencement of the action, (fol. 5,) and there is no evidence that John Hall or any of his family ever resided in California, nor is there any pretense that Hall or any member of his family was ever in actual possession of any part of lot 89.

Mary K. Hall, the widow, died in July, 1867. (Fol. 43.)

The suit was originally commenced against eighteen defendants, but by discontinuance the number was finally reduced to seven, viz.:—Henry S. Dexter, Lawrence Duncan, C. H. Blackman, C. D. Taylor, E. W. Burr, Benjn. D. Dean, Trustee, &c., and Sarah E. Smith. (Fols. 4, 13, 31, 33.)

The cause came on for trial, in the Circuit Court of the United States, for the District of California, on the 30th day of July, 1867, before Mr. Justice Field, and a jury. The claim for *mesne profits* was thereupon withdrawn. The plaintiffs had a verdict, and thereupon, on motion of the plaintiffs, the action was dismissed as to all of the defendants, except the Plaintiff in Error. (Fols. 37, 38.)

Judgment was entered upon the verdict against Dexter, who brings Error to this Court. The writ of Error is set out at page 1, and the Bill of Exceptions at page 14, of the Error Book. The Citation will be found at page 45. The Pleadings are set out on pages 3 and 6.

The defendant Dexter, having duly excepted to the rulings, decisions and charge of the Court, now submits the following

POINTS.

I.

The Plaintiff in Error entered and held possession under claim and color of title, to wit, a deed from Page, who held

by deed from John Hall and wife, under their Power of Attorney. (Error Book, p. 20, fol. 58.) This was good to found an adverse possession, at least.

McDonald v. Bear River, &c., Co., 13 Cal., 220.
Nieto v. Carpenter, 21 Cal., 455.
Williams v. Council, 4 Jones' Law, (N. C.) 206.
Harden v. Barrett, 6 id., (N. C.) 159.
Hester v. Coats, 22 Geo., 56.
Grant v. Fowler, 39 N. H., 101.
Farrar v. Fessenden, 39 id., 268.
St. Louis v. Gorman, 29 Miss., (8 Jones,) 593.
Vancleave v. Milliken, 13 Ind., 105.
Edgerton v. Bird, 6 Wis., 527.
Dickinson v. Breeden, 30 Ill., 279.
Munro v. Merchant, 28 N. Y., (1 Tiff.) 9, 41.
Root v. McFerrin, 37 Miss., (8 George) 17.

1. The Plaintiff in Error held under a conveyance from Daniel D. Page, dated September 22d, 1853. Page held by deed from Hall and wife, by their Attorney. Even if the deed to Page was void, it gave color of title to a party in actual possession, claiming under it, as the cases cited abundantly show. This was sufficient to establish an adverse possession, which would ultimately ripen into a title, unless the plaintiffs could overcome it.

2. Mr. Dexter held by a title not merely adverse to the plaintiffs, but one derived from the plaintiffs intestate. If then a conveyance from one having no title, or a defective title, might ripen into a fee, much more would a title coming directly from the party through or under whom the plaintiffs' claim, become a fee.

3. Page was in possession some time prior to September 22d, 1853. How long, does not appear; but the lot was enclosed by a substantial picket fence, and Page had built upon it a house, of the annual rental value of $600. (Fol. 58.)

There is no dispute that he held by grant and under claim of title, which was adverse to that of the plaintiffs, and derived directly from John Hall or his grantees.

4. And Dexter held under this title as a bona fide purchaser for value, and without notice. (Fols. 58, 60, 61.)

II.

Assuming, for the purposes of the argument, that Hall was insane when he executed the power of Attorney, we insist that neither the power nor the deed executed under it was void. It may have been voidable, but it was not void. Suppose, instead of a power of Attorney, the instrument had been a contract for the sale of the land, acknowledged by Hall and wife, and that the contract had been assigned through Page to Dexter for value; the same objection would lie against it as against the power of Attorney. The consideration being adequate, and the transaction being free from fraud and without notice, a Court of Equity would enforce it against both.

Jackson v. Gumaer, 2d Cow. N. Y., 552.
Ingraham v. Baldwin, 12 Barb. N. Y., 9.
Same v. Same, 9, N. Y., (5th Seld.) 45.
Story's Eq. Jur., §§ 751, 771, 772, 774, 788, and notes.
Willard's Eq. Jur., (N. Y.) 196, 201, 202-3, 297, and notes.
Williston v. Williston, 41 Barb. N. Y., 635.
Kerr v. Purdy, 50 id., 25.
Cuff v. Dorland, 50 id., 438.
Freeman v. Freeman, 51 id., 306.
Bruce v. Tilson, 25 N. Y., (11 Smith) 194.
Lobdell v. Lobdell, 36 id., (9 Tiff.) 327.
Story v. Conger, 36 id., 673.

Worrall v. Munn, 38 id., (11 Tiff.) 137.
Card v. Card, 39 id., (12 Tiff.) 317.
Chew v. Bank of Baltimore, 14 Md., 299.
Somers v. Pumphrey, 24 Ind., 231.
Crouse v. Holman, 19 id., 30.

1. These authorities abundantly establish the position, not only that the Power of Attorney was not void, but that upon the proofs, a Court of Equity would decree a specific performance of a contract of sale made under it.

2. There is no proof that Hall and Dexter or Hall and Page ever met, or that Page or Dexter knew of or suspected the insanity of Hall, nor is there any evidence of unfairness, fraud, or inadequacy of price.

Yauger v. Skinner, 1 McCarter, (N. J.) 389.

3. The Attorney selected by Hall was his brother-in-law. (Fols. 63, 73.) No motive is shown for any fraud or deception by Harris or by those who acted in obtaining the power. They were his relatives and friends, and his wife afterwards executed a similar power, so far as appears, without objection.

4. The learned Judge was therefore wrong in instructing and charging the jury that the Power of Attorney was absolutely void.

Fol. 7, p. 27, and pp. 37-8.

The cases clearly show that it was only voidable.

See in addition to the authorities above cited.

Breckenridge v. Ormsby, 1 J. J. Marsh, (Ky.) 236.
Fitzgerald v. Reed, 9 S. and M., (Miss.) 94.
Richardson v. Strong, 13 Ired. (N. C.) 106.
Molton v. Camroux, 2 Exch. Rep., 487.
Same v. Same, 4 id., 17.

Price v. Berrington, 7 Eng. L. and Eq., 254.
Beavan v. McDonald, 24 id., 484.
Same case, 9 Exch. Rep., 309.
2d. Washb. on Real Estate, *558, pl. 13, *564, pl. 21.

5. We submit, that the deed of Hall by his Attorney was not even voidable. So far as appears, he had not been placed under a committee, nor had he been pronounced insane by judicial decision, and until that is done, his contracts are valid, no undue advantage having been taken of him in obtaining the contracts.

Sims v. McClure, 8 Rich. Eq., (S. C.) 286.
Hovey v. Chase, 52 Maine, 304.
2d Washb. on Real Estate, *558 pl. 15, and note 5.
Parker v. Davis, 8 Jones L., (N. C.) 460.

(a.) Even if Hall was insane at times, we insist that the evidence shows that the power was executed by him during a lucid interval, and this is all that was necessary to sustain it.

Lilly v. Waggoner, 27 Ill., 395.

At least, the legal presumption of validity was in its favor.

(b.) The testimony of the Commissioner establishes the fact that he understood the object of the paper, and its effect as a power to convey lands. It also shows that he knew the value of the property, and that he desired its sale for the same reason that any sane man might have desired it—for the benefit of his family.

Error Book, p. 22, Fols. 63, 64, 65.
Hovey v. Chase, 52 Maine, 304.
Maddox v. Simmons, 31 Ga., 512.

6. Suppose Hall had executed a deed of the lands

under the same circumstances, we submit, that upon the facts proved in the case, a Court of Equity would not have set it aside, or pronounced it void.

Story's Eq. Jur., § 228.
Neill v. Morley, 9 Ves., 478, 482.
Sergeson v. Sealy, 2 Atk., 422.
Carr v. Holliday, 5 Iredell Eq. Rep., (N. C.) 167.
Price v. Barington, 3 Mac. and Gord., 486.

(a.) The title under the Alcalde grant was in dispute, and under the circumstances of the case, the sale was judicious.

Error Book, p. 36, paragraph 5.

(b.) No complaint is made that the consideration was inadequate, or that it was not fully paid by the purchaser.

(c.) And there is no evidence or pretence of fraud in obtaining the power, or in executing the grant. If there was fraud there is no evidence that either Page or Dexter was privy to it.

(d.) Mrs. Hall, with knowledge of her husband's condition and of the circumstances of the family, joined in the power, and the Judge who tried the cause pronounces it a judicious and wise step, as it doubtless was. And we submit that no Court of Equity upon these facts, would set it aside.

Story's Eq. Jur., § 227.

Again. We say the paper executed and acknowledged by Mrs. Hall was valid and operative as a power to convey lands, and the Court below erred in excluding it as evidence.

Error Book, Fols. 57, (p. 20,) 72–3, (p. 25.)

(a.) It was on the same paper with and distinctly referred to her husband's power, although executed at a different time and place. It was good as an estoppel at least.

Error Book, Fols. 57, 73-4.

(b.) It was properly acknowledged by her, and was recorded.

Id., Fols 75, 76.

(c.) There is no pretence that it was executed under coercion, duress, or any undue influence.

(d.) A deed of the lands executed and acknowledged by her under such circumstances would have been valid; and no good reason can be given why she might not act by Attorney in any case where she might lawfully do the same act in person. In New York and in Massachusetts, a married woman may act by Attorney. In Indiana, she may not acknowledge by Attorney, but it is an open question whether she may not create an Attorney, with power to convey. 6 Blackf., 531. In Iowa, upon a similar statute, it was conceded that such a power was valid. 13 Iowa, 137; and this Court held a deed executed by a *feme covert* by her Attorney, a valid conveyance.

Gridley v. Wynant, 23 How. U. S. Rep., 503.
2d Washb., *564, pl. 21, and notes.
Dawson v. Shirley, 6 Blackf., 531, (Ind.)
Wilkinson v. Getty, 13 Iowa, 137.
Willard on Real Estate, (N. Y.) 269.
Koch v. Briggs, 14 Cal., 262.

It was therefore error to exclude it as a power of Attorney, valid and effectual in law to authorise a conveyance of her interest in the lands.

III.

The Court erred in refusing, when the plaintiffs rested, to instruct the jury as requested by the defendants' counsel, or in other words, in refusing to non-suit the plaintiffs. (Error Book, p. 18, Fols. 51, 52.) As the case then stood, the action was clearly barred by lapse of time.

The rights of the widow and children of Hall, if they had any rights in the lands in question, attached and became perfect on the death of Hall, in September, 1860. The Statute (of limitations) ran from that time.

Cal. Statutes, Act of April 22d, 1855.

And this Statute, we submit, ran against all the plaintiffs, minors as well as adults.

Clark v. Huber, 23 Cal., 593.
Simpson v. Shannon, 3 A. K. Marsh., (Ky.) 462.
Wells v. Ragland, 1 Swan, (Tenn.) 501.
Mitchell v. Berry, 1 Met., (Ky.) 602.
Walker v. Bacon, 32 Mis., 144.
Richardson v. Williamson, 24 Cal., 289.

1. If Hall had title at all, he took it under the Grant of December 30, 1848, as ratified by the Van Ness ordinance, which took effect Jan. 1, 1855. The title was perfected by this ordinance, and not by the Act of Congress of July 1, 1864. That Act relinquished and granted to the city and its successors, all the lands within the corporate limits of its charter of 1851, *for the uses and purposee specified in the ordinance of said city*—meaning the Van Ness ordinance. (See 13 U. S. Statutes at large, p. 333 and 335.) This takes us back to the ordinance itself which recites that "the city of San Francisco hereby relinquishes and "grants all the right and claim of the city to the lands "within the corporate limits, to the parties in the *actual* "*possession* thereof, by themselves or their tenants, on "or before the first day of January, A. D., 1855, *

"* * provided, that all persons who hold title to "lands within said limits by virtue of any grant made "* * before the 7th day of July, 1846; or grants to "lots of land lying east of Larkin street and north-east "of Johnson street, made by any ayuntamiento, town "council or Alcalde of said Pueblo, since that date and "before the incorporation of the city," (April 15, 1850,) * * "and which or the material portion thereof was "recorded, &c., * * shall, for all the purposes of "this ordinance be deemed to be the possessors of the "land so granted." The Act of Congress, then, related back to and confirmed, what was before sought to be accomplished by the ordinance. It did not give title, but simply confirmed the title already granted by the ordinance itself. It will be seen that the act of 1864 does not grant or relinquish any title to individuals, whether holding grants or not, but to the city. So by the ordinance the city grants its rights and claims, in one case, to the actual occupants, and in the other, to parties holding recorded grants. The State Legislature in 1858, (March 11th,) ratified and confirmed the action of the City Council, and thus by relation the title was settled as of January 1st, 1855, or of the date of the grant to Hall in December, 1848; probably under the latter.

See opinion of Mr. Justice Field in Grisar v. McDowell.

2. By the acts of Hall, voidable if you please, other parties acting in good faith and without notice of any defect in their title, had acquired rights in the property, by mesne conveyances from Hall himself, by his Attorney, and were in actual possession and had made valuable improvements.

Error Book, p. 20, fol. 58.

3. As the case then stood, there was no pretence of Hall's insanity: It stood admitted upon the record, that

the defendants below were in possession of the premises in October, 1860. In other words the complaint alleges a seizin on the 30th of September, 1860, and the entry of the defendants on the 1st of October following. (Error Book, fols. 5, 6.) If these allegations are true, the statute of limitations ran against the plaintiffs from that day—the first of October, 1860.

Flowers v. Foreman, 23 How. U. S., 132.
Bruce v. Tilson, 25 N. Y., (11 Smith,) 104.

4. Mrs. Hall and her son were of full age when Mr. Hall died. The son was born August 27, 1839. (Error Book, p. 17, fol. 50.) He was therefore 21 years old on the 27th of August, 1860.

Upon the evidence, then, the action was barred at least as to one-half of the property. By the California statutes of descent, the widow took one-third of the property both real and personal, and the four children took the residue in equal shares, or one-sixth each.

Cal. Stat. of April 13, 1850, § 1, Descents, &c.
" " 22, 1850, §§ 6, 7, 8, Limitations.
" " 11, 1855, Amendatory of last.

5. Under these statutes, no reservation is made as to persons under disability, and we submit that the statute ran as to all the plaintiffs, as well those under age as those of full age.

(*a.*) It ran against the ancestor, and his death did not suspend it.

(*b.*) It ran against part of those having a joint interest in the land, and therefore against all.

Jackson v. Moore, 13 John. Rep. (N. Y.,) 513.
Simpson v. Shannon, 3 A. K. Marsh., (Ky.) 462.
Jordan v. McKenzie, 30 Miss., (1 George,) 32.
Cal. Laws of 1855, chap. 87, p. 109.

6. We submit then, that the statute ran against Mrs. Hall and her son, from the death of John Hall, in September, 1860. The son was not then a minor as charged by the Judge, at p. 31, fol. 90. He became of age in August in 1860. (See p. 17, fol. 50.) And the disability of coverture as to Mrs. Hall was removed by the death of her husband. The action was not commenced until the spring of 1866, more than five years and a half after the disability as to both was removed. Mrs. Hall owned one-third and her son one-sixth of the land, making, together, one-half. As to this portion of the land, upon any theory of the case, the action was barred by lapse of time. The statute ran against Mrs. Hall, from the death of her husband, and her own death did not suspend it as against those claiming under her. We insist also, upon the facts proved, that the plaintiffs having a joint interest which was barred as to two of them before suit brought, the action was barred as to all of them.

7. It will be seen by reference to the judgment entered, that only three of the plaintiffs recovered in the court below. There is no suggestion of the death of Mary K. Hall, the younger, nor is any reason given, why she is dropped out of the suit. (Error Book, pp. 13–14, fol. 39.)

There is also some confusion as to the correct name of the plaintiff, J. L. Hall. He is called J. Judson Hall in the Complaint, (p. 3, fol. 4.) J. Ladson Hall, in the Judgment, (pp. 13–14, fol. 39.) James Lawson Hall in the Bill of Exceptions, (p. 17, fol. 50,) and J. Latson Hall in the Citation, (p. 43 of Error Book.) We suppose that all these indicate one and the same person, and have given him the name stated in the Judgment.

IV.

If we are wrong in supposing that the action was barred

as the case stood when the plaintiffs rested, then we insist that upon the whole evidence, the action was barred by lapse of time.

See authorities cited under 3d Point.

1. As we have already seen, the Power of Attorney and the conveyance executed under it were sufficient to found an adverse possession. The statute of limitations of 1850 was then in force, but was afterwards amended in 1855, and the time extended to five years from the last date.

Morton v. Folger, 15 Cal., 275.

2. The grantees held actual possession under that conveyance down to the commencement of the action in 1866, a period of over eleven years.

Error Book, p. 20, fol. 58.

3. This adverse possession, as against Hall or those claiming under him, would ripen into a perfect title at the expiration of five years from the time it commenced. Thus it will be seen that his right was barred before his death.

4. At all events the statute commenced to run in the spring of 1855, (act of April 11th, 1855,) and his death did not suspend it as against his heirs.

Becker v. Van Valkenburgh, 29 Barb., (N. Y.) 319.
Jackson v. Moore, 13 John. Rep., N. Y., 513.
McCracken v. San Francisco, 16 Cal., 591.
Doswell v. De La Lanza. 20 How. U. S., 29.
Lea v. Polk County Copper Co., 21 How. U. S., 493.

These cases clearly establish the position, that whenever an adverse possession, founded in claim of title.

begins, the statute of limitations runs from that time, and that no disability existing at the time, or arising afterwards, suspends it.

5. We insist then, that as to two of the plaintiffs below, the right was barred at the commencement of the action: and we submit, that it was barred as to all of them.

(*a.*) The acts of Hall, though perhaps voidable, in connection with the voluntary act of Mrs. Hall, had led to a sale of the property, which, under the circumstances, the Court pronounced *judicious and wise.* This gave rise to a conveyance unquestionably good in law to found an adverse possession. The defendant below and his grantor were, beyond a doubt, *bona fide* purchasers for value and without notice, and their possession was uninterrupted from the date of their deeds.

(*b.*) The Plaintiff in Error, thus purchasing and relying upon his deed, conveyed portions of the property to other parties, who purchased in like good faith, and all proceeded to improve their lots, until, at the time of the trial, the property had become very valuable.

(*c.*) The plaintiffs made no claim to the property until 1866, at least fourteen years after the acts of their parents had put other parties in possession, under color of title.

It seems incredible that it should be held, that the Van Ness Ordinance, aided as it was by State and National legislation, swept away all the rights of the Defendant in Error, and revested them in those who had given him those rights, who had placed him or his grantor in possession, and surrounded

him with all the safeguards known to the law, for his protection against their acts and the acts of those claiming under them.

This construction is said to be authorised and required by the language of the ordinance itself, which provides that persons holding recorded or registered grants of lands in the designated part of the city, "shall for all the purposes contemplated by this ordinance, be deemed to be the possessors of the land so granted." Are they to be held the possessors against their own grantees—against the parties in actual possession under their own deed? We submit that this is not the reasonable or the legal construction of the terms used. The most that can be said is, that the ordinance gave them, *prima facie*, the possession, either actual or constructive. But the moment it appeared that others were in actual possession, holding under their deed, at least valid in law to found an adverse possession, the presumption arising under the Van Ness Ordinance vanished. The defendants being in the actual possession with color of title from the plaintiffs or their ancestors, there was no ground for the presumption, that the plaintiffs had any possession, either actual or constructive, under the Van Ness Ordinance.

V.

It may be questioned whether evidence to show the insanity of Hall at the time of the execution of the power of Attorney was admissable. The evidence was objected to on the ground that the power and the deed executed under it, could not be attacked collaterally in an action at law.

Error Book, p. 20, fol. 59.

The general rule is, that deeds, contracts, and writings

under seal can only be reformed, corrected or set aside in a Court of Equity. If this were not so, no man's title would be secure against attack even in a court of law.

Story's Eq. Jur., § 229, and notes.

VI.

The Court erred in admitting the testimony of the witness, Edward Wright, in answer to the question, "Who, if any one, recommended his (John Hall,) going to the asylum?" This was equivalent to asking who pronounced, or who considered him insane. The answer shows that the witness only intended to say that the physicians of Hall gave an *opinion* on the subject, in *which opinion* others concurred. This we submit was incompetent within any rule of evidence.

Physicians as witnesses, may give their opinions based upon facts observed by them, or testified to by others. But it has never yet been held, that a retired merchant was competent to give the opinion of a physician, expressed fifteen years before, upon a question of sanity or insanity; and we submit that the declarations and opinions of the friends and family were equally incompetent. The witness may have been competent to give his own opinion, in connection with the facts observed and detailed by him, but not to give in evidence the opinions entertained by others. (Error Book, p. 21, fol. 60.)

VII.

The Court erred in excluding evidence offered to show that the purchase of the lands was made in good faith, for a full and adequate consideration, and without notice of Hall's insanity; and in charging the jury that "if Hall was insane and his insanity was general, the instrument" (the power of Attorney,) "was a nullity, and no title could be

transferred under it. In that case the plaintiffs are entitled to a verdict. It matters not, if such were the case, what consideration may have been paid to the Attorney, or with what good faith the parties may have purchased. The instrument, in such case, is no more to be regarded as the act of John Hall, than if he was dead at the time of its execution." (Error Book, p. 21, fols. 60, 61, pp. 37-8.) This branch of the charge was specifically excepted to. (See p. 42, par. 5.)

We submit that this ruling and charge are directly against the rule laid down by Judge Story, and can not be sustained.

Story Eq. Jur., § 228, and cases cited in notes.
2d Washb. on Real Estate, *558, par. 15, and notes.

1. The authorities heretofore cited, and many others, show that the deed was not void, if it was even voidable. Such a deed, says Washburne, passes a seizin, and is only regarded as voidable and not void, and all the cases hold that it was good to found an adverse possession.

2. The effect of the ruling was to exclude the precise evidence, on which Judge Story says a Court of Equity would sustain the deed of an insane person.

VIII.

The Court, at fols. 72–3, excluded the Power of Attorney executed by Mrs. Hall, as a power, but admitted it for any other purpose. This we submit was error. It was only as a power to convey, that it was competent or material for any purpose.

The effect and validity of this power have been noticed under the second point, and need not be considered here.

IX.

The Court erred in ruling and deciding that the medical witnesses produced on behalf of the defendants below, could only give opinions founded upon the testimony of plaintiff's witnesses. (Error Book, p. 26, fols. 76, 77.) The witness was a physician long in practice, and health officer of the port of San Francisco, and had carefully read all the testimony in the case relating to the sanity or insanity of Hall. The question put was, "*From the facts stated*, in these depositions" (all the testimony so far was by depositions,) "and *the symptoms stated*, what, in your opinion, was the state of John Hall's mind in December 27, 1852, as to sanity or insanity?"

To this the plaintiffs objected, not that the *question* was incompetent, but that it was incompetent for the witness to form an opinion based upon all the testimony touching the mental condition of Hall, given on both sides. The Court sustained the objection, and confined the witness in making up his opinion, to the evidence of insanity given by the plaintiffs. (Error Book, fol. 77.)

This, we submit, was error. It excluded from the witness and from the jury the consideration of any of the facts tending to prove sanity or a lucid interval, and presented to their minds only the facts going to establish the insanity of Hall.

1 Beck's Med. Jur., (10th ed.,) p. 772–3.
2 id., (") p. 917.
Ray's Med. Jur., p. 349.
Roscoe's Crim. Ev., (3d ed.,) p. 179, and cases cited.
Russ. on Cr. by Grea, 6 Am. ed., p. 924.
5 Phill. Ev., 3d ed., p. 924–5.
1 id., 4th Am. ed., p. 778–9.
1 Greenleaf's Ev., § 440, and notes.
The People v. Lake, 12 N. Y., (2 Kern.,) 358.

1. In the case last cited, the Court of Oyer and Terminer allowed several physicians to testify, who

had heard only part of the testimony on the question of the sanity or insanity of the prisoner, his counsel objecting to the testimony on the specific ground that they had not heard all of the evidence given. The prisoner was convicted. The Supreme Court, on error, reversed the judgment. The case was taken to the Court of Appeals, where the decision of the Supreme Court was unanimously affirmed. The Court of Appeals laid down the rule in these words: "It is not competent for a medical witness, who has not heard all the testimony tending to show the mental condition of a person, to give an opinion founded on the portion heard by him, as to his sanity." The authorities cited all tend strongly to the same conclusion.

2. We are not obliged to consider whether the question as put was competent or incompetent. The point is, that the question as changed by the Court compelled the witness to base his answer upon a part of the testimony only, and upon that part adduced to prove the insanity. All qualifying facts and symptoms were thus wholly excluded from consideration.

3. The fact that all of the medical witnesses called by the defendants testified that the facts proved by the plaintiffs, indicated that Hall was capable of doing business and of executing a Power of Attorney, before, at and after the date of the power given in evidence, does not aid the plaintiffs' case, or justify the ruling of the Court. The ruling is just as erroneous as if they had all testified the other way. The judge excluded from the consideration of the witnesses and the jury, among other things, the fact which Sir W. Wynn pronounced "the strongest and best evidence of a lucid interval that can arise," namely, the doing of an act declared by the Judge to be, under the circumstances, judicious and wise. (Error Book, p. 36.)

Cartwright v. Cartwright, 1 Phillimore's Rep., 90, 101.

4. There was no suggestion of any conflict of evidence whatever, and therefore no pretence that the question as proposed, permitted the witness to determine in his own mind the credibility of testimony, or any other question of disputed fact. The evidence on the part of the defendants was merely cumulative, and only tended to show the mental condition of Hall at the time the power was executed. Hence no unfixed or flexible basis of opinion was suggested by the interrogatory. Neither the objection nor the ruling was put upon the ground that the witnesses were required to determine the truth or falsity of the testimony given; but the question, as limited by the Court, was this:—Assuming the truth of the witnesses (that is, some only of the witnesses sworn and testifying in the case,) and from the facts and symptoms stated by them, what in your opinion was the state of Hall's mind as to sanity or insanity? But why exclude the facts shown by the witness Brodhead. No witness on the part of the plaintiffs had contradicted him, or stated any fact in conflict with his testimony. The plaintiffs' witnesses proved facts indicating insanity before and after the execution of the power; but none of them, so far as appears here, spoke of his appearance or his acts at the time of its execution, or about that time. Why then, we ask again, exclude all testimony showing his condition at that time? Clearly not because of any conflict between the witnesses, nor because the question, upon the whole evidence, would put the witnesses in the place of the jury.

5. But supposing the case one involving the credibility of witnesses,—even then the objection could not be upheld, the question being strictly hypothetical. It was not what do you say "upon the evidence?" But, "from the *facts stated* * * * and the *symptoms stated*, what do you say," &c. Is there a doubt of the meaning here? Can it be any thing but this—assum-

ing the facts and symptoms stated, (whether truly or falsely is immaterial,) taking them as your hypothesis, what is you opinion?

6. Suppose ten witnesses had sworn to facts showing that prior to and on the 15th day of December, 1852, and on and after the 15th of January, 1853, Hall was insane, and five witnesses, without at all contradicting the ten, had sworn to facts showing that from the 20th of December to the 10th of January, he ate and slept well, and was calm and rational, and attended to business with prudence and skill. Here would be no conflict of testimony. Suppose now a medical witness was called, who had heard only the testimony of the ten witnesses, to give his opinion; What would he or could he say, except that the facts clearly indicated insanity? And one who had only heard the five testify, would just as surely and as truly say, that the facts and symptoms proved indicated sanity, or at least a lucid interval. Now suppose each of these witnesses had heard the testimony of all the witnesses on both sides, it can hardly be doubted that both would say that he was insane before the 15th of December, and after the 15th of January, but that between the 20th of December and the 10th of January, he had a lucid interval, and was competent to transact business. And this, and this only, within the rule laid down, would be competent evidence. It will not do to say that the defendants' counsel might have put the same question, based upon the testimony of his witness, for this would lead to no satisfactory result; nor would it aid the jury in coming to a correct conclusion, but would rather tend to confuse their minds, and lead them away from the true issue.

7. Suppose, again, that the defendants had fully satisfied the jury, by the facts detailed, that Hall was

a sane man at the time he executed the Power of Attorney, but his counsel, not knowing this, had called medical witnesses, who were directed by the Court to predicate their opinion exclusively of the evidence given by the plaintiffs, and tending to prove that he was insane, and that alone; the effect of such ruling would be, to instruct the jury that they must look only to the plaintiffs' testimony in determining the sanity or insanity of Hall. This, we submit, can not be the rule of evidence in such a case, or in any case where the testimony of skilled witnesses is admissible. The ruling was, in substance, a direction to the jury, as well as the witnesses, to reject all testimony on the part of the defendants showing or tending to show sanity or a lucid interval. It excluded all evidence on the question of sanity or insanity, except such as the plaintiffs chose to give on their part. And for this reason alone, if for no other, the defendant should have a new trial, and an opportunity to present his side of the question to the jury, untramelled by a decision which virtually instructs them to disregard it.

X.

The Court erred in instructing the jury, as matter of law, that a Power of Attorney executed by an insane person, or one of unsound mind, is absolutely void; (fol. 78, p. 27, and fol. 83, p. 29.) And also in refusing to instruct them that the deeds, contracts, &c., of an insane person are only voidable and not absolutely void. (P. 30, fol. 87; p. 31, fol. 89.) These propositions were fully discussed under our second point, and need not be further noticed here.

See authorities cited under 2d and 7th points.

XI.

The Court erred in instructing the jury as matter of law,

that the fact that the defendants' counsel declined to cross-examine the physicians who had Hall under treatment, on the question of a lucid interval, was a significant fact in favor of the plaintiffs. (Fols. 82–3, p. 28–9.) Such, we submit, is not a ground of presumption, either of law or fact.

1. The witnesses were examined on interrogatories, in Pennsylvania, two thousand miles from defendants' residence.

2. If the witnesses had been present and examined orally on the trial, the mere fact that the defendants' counsel did or did not choose to cross-examine them, would raise no presumption for or against the defendants.

3. Suppose the defendants' counsel had declined to sum up the cause upon the evidence, this would raise no presumption against his client. Much less would it authorize the jury to presume that the client had *no* defence, or a weak one. Presumptions do not arise upon the omissions of counsel in the absence of their clients, except perhaps in some merely technical matters of practice.

XII.

The defendants below excepted to various portions of the charge, which exceptions are set out at pages 41, 42, and 43, of Error Book. We submit that these exceptions, and especially the first and fifth, are well taken, and we ask the attention of the Court to all of them.

1. As has been already shown, the learned judge fell into an error in relation to the age of J. Latson

Hall. He was born in August, 1839, and of course attained his majority in August, 1860, before his father died.

See Error Book, fol. 50, p. 17.

2. Neither the Van Ness Ordinance, nor the State or national legislation, destroyed the legal effect of the Power of Attorney and the conveyance executed under it. Any title acquired subsequently, enured to the grantee under the power, or to his grantees.

3. The authorities clearly and abundantly establish the proposition that the power was not void. At most, it was only voidable, and we submit that it could not be avoided after five years had elapsed, from the death of John Hall, even if it could after five years from the passage of the California Statute of Limitations of 1855.

4. And finally, we submit, that the Plaintiff in Error, having purchased the property in good faith, from a party in actual possession under claim and color of title, and for value paid, without notice of the alleged insanity of John Hall, or of any defect in his title; and having made extensive and valuable improvements thereon in like good faith, cannot be ejected therefrom, after fourteen years actual possession, under color and claim of title derived from the ancestor under whom both parties claim.

ROSCOE CONKLING,
of Counsel for Plff. in Error.

Kilbourne Tompkins, Printer, 16 Cedar Street, N. Y.

United States Supreme Court.

HENRY S. DEXTER,
Plaintiff in Error.
against
MARY K. HALL, *et al.*,
Defendants in Error.

Points for Defendants in Error.

STATEMENT OF FACTS.

This case comes up on a writ of error to the Circuit Court of the United States, for the District of California, to reverse a judgment rendered in an action of ejectment, in favor of the defendants here, who were the plaintiffs below.

The cause was tried in July, 1867, before the Hon. S. J. FIELD, and a Jury.

The exceptions are of a two-fold character:—First, as to evidence claimed to have been erroneously admitted. Second, as to propositions of law contained in the charge to the jury.

The action was brought by the widow and children of John Hall, formerly a lieutenant in the United States Navy, to recover the possession of a one hundred vara lot, now in the heart of the City of San Francisco.

Pending the litigation the widow died, and her death having been suggested on the record, the action proceeded in the names of the children.

This title depends upon an Alcalde Grant, and the Acts of the Legislature of California, and of Congress, ratifying the title of the grantee.

PLAINTIFF'S TITLE.

December 30, 1848.—Original petition of John Hall to T. M. Leavenworth, Alcalde and Chief Magistrate of San Francisco, asking for lot in controversy, and grant of lot to John Hall, together with a receipt for $25 exclusive of office fees. Record folios 45, 46.

As to *recording* of grant, to bring it within the terms of ordinances, and laws hereinafter mentioned, the plaintiffs below proved, that prior to April 3d, 1850, their grant was duly recorded in books of the County Recorder. Record folio 47.

Plaintiff offered case of United States *vs.* Pueblo of San Francisco, including petition and decree of Board of Land Commission, down to and including mandate of the Supreme Court, dismissing the appeal, filed Feb. 3, 1867. Record folio 47.

Plaintiff proved that no patent had been issued to the Pueblo or City. Record fol. 48. That defendants were in possession at commencement of suit. Record folio 49. That the premises were within the corporate limits of San Francisco, and have always been east of Larkin and north of Johnston Streets. Record folio 49.

That the premises have never been set apart for any public use. Record folio 49.

Plaintiff offered Van Ness Ordinance and Act of Legislature of California, ratifying same. Stat. Cal., 1858, p. 52.

Plaintiff offered act of Congress confirming the same, July 1, 1864, and March 8, 1868. Vol. 13 U. S. Stat. at large, p. 333 and 335.

PLAINTIFF PROVED.

Nov. 22, 1838.—Marriage of John Hall and Mary K. Hall, and birth of following children:

1839, Aug. 27.—James Ladson Hall.
1843, Oct. 20.—Mary Kelley Hall.
1845, Sept. 10.—Hetty Willis Hall.
1851, April 29, Jane Harris Hall.
1860.—Death of John Hall.
1866.—Death of Mary K. Hall, widow.

Plaintiffs.

DEFENDANT'S TITLE.

Possession—The defendant proved and relied upon prior possession, and several different statutes of limitation.

1852, Dec. 27.—Power of attorney from John Hall to James W. Harris.

Substitution by James W. Harris of the name of David B. Rising, as attorney.

Mesne conveyances from John Hall, by David B. Rising, his attorney, in fact, to Henry S. Dexter.

PLAINTIFFS IN REBUTTAL

Proved:

Lunacy of John Hall from 1851 to 1860, during most of which time he was in a lunatic asylum. He was present in the asylum as a lunatic Dec. 27, 1852, when the power of attorney was made, and *signed another than his own name* to the power, which signature was erased. Died in asylum in 1860, without lucid intervals.

Jury found for plaintiffs, which settled the fact of insanity at date of execution of power.

The question is, should a new trial be granted, either for errors in admitting or excluding evidence, or for errors in the charge to the jury;

The 1st, 2d, 3d, 4th, 5th, 6th exceptions were to rulings admitting or rejecting evidence.

The 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, to end, were rulings on various propositions of law.

1st Exception.—As to the one year's statute of limitations. Rec. fol. 51.

The Act of the Legislature of California, passed March 5, 1864, requiring proof of a five year's prior possession by the plaintiff, in all cases where the action of ejectment should not be commenced until the expiration of one year after said act took effect, does not apply to the lot in question.

That statute did not relate to lands to which the owners had derived title from *grants* valid in themselves, or validated by the act of the legislature ratifying the Van Ness Ordinance, and by the acts of Congress of July 1, 1864, and March 8, 1868. The act of legislature related to those titles only in San Francisco which were derived from possession alone.

That is to say the statute of limitations was levelled at titles derived from *possession*, and *not from grant.*

The act of March 5, 1864, refers to the act of April 1858. Stat. Cal. p. 52.

From a perusal of the latter act, and from the general history of the country, it is clear that in 1858 there were two distinct and rival parties claiming title to lands in the pueblo of San Francisco. One party held portions of the city by and under Alcalde Grants, while the other held by possession solely, what was known as "outside lands." To perfect the titles of these two classes of holders, it was agreed that the titles of the grant holders, within certain limits, should be confirmed to them, and the titles of those claiming by possession only, within certain limits, should be confirmed to them. An ordinance to that effect, known as the Van Ness Ordinance,

from the name of the introducer, was passed by the Board of Supervisors, and subsequently, in April 1858, was ratified by the Legislature.

In that act the two classes of title holders are distinctly recognised, and the claims of each are confirmed.

In regard to the paper source of title there was no necessity for subsequent legislature to determine the grant-holders, or the property granted, for these grants were recorded in the public records; but as the town extended out beyond the property granted, among trackless sand-hills, overgrown with brush, without opened streets, and inhabited by a vagrant race of bush cutters, herdsmen, and charcoal burners, it became each year more and more difficult to determine the conflicting claims of title, founded on possession only; especially a possession reaching back to 1858, and held by a restless and evanescent population, whose fences were brush heaps, and whose houses were tents, or huts of bark.

To prevent this litigation relating to the outside lands, and to fix a stable basis for titles founded on possession alone, it became necessary to have a Statute of Limitations. To make the evidence of the prior possession of these sand hills as satisfactory as possible, it was enacted, in effect, that no suit should be brought to recover the possession of such lands unless brought within one year after the passage of the act, except the plaintiff could prove a five year's actual possession.

The absurdity of applying this statute to the holders of Alcalde grants who have a paper recorded title, is manifested from the consideration, that a recorded Alcalde grant is quite as clear and indisputable an evidence of title as a five years' possession.

Again, the entire city front of San Francisco, valued at millions of dollars, has been conveyed under Alcalde grants alone. At the time this Act was passed a great portion of this land was, and some still is under water. No one can readily obtain possession of them. Was it intended by the Legislature to confiscate these lands for the benefit of any adventurous squatter who might locate

a scow containing his household gods upon the theretofore unpossessed and yielding mud?

2d. Exception.—The exclusion of the power of Attorney from Mary K. Hall was correct.

(*a.*) Married women had no power to make an Attorney in fact, until the Statute of 1863, passed ten years after the above-mentioned power was executed.

See Stat. Cal., 1863.
Hittel's Dig. Cal. Stat. pp. 715, 664.

(*b.*) The acknowledgment was defective for the reasons assigned in record. Rec. fol. 57.

There was no other proof of execution.

(*c.*) The power was irrelevant. Its only possible effect, if admissible, was to show that Mary K. Hall was apprised of the fact that her husband had signed the power. It does not strengthen the case of the plaintiff in error, that the parties who perpetrated a fraud on a lunatic, succeeded also in persuading a credulous woman into furnishing apparent evidence that she was apprised of their intentions.

3d. Exception.—"The deed of a lunatic is not void, at law, but voidable only in Equity, and the same rule applies to a power of Attorney. Proof of lunacy not admissible in an action of ejectment."

It was argued below that prior to the issuing of a Commission de Lunatico, the acts of a lunatic were binding upon him, but after that, they were not.

It may be sufficient to observe that the Commission has no effect whatever to render the mad man more insane than he was before. And it is his insanity that renders the act void. The Commission may be *prima facie* evidence of madness, sufficient to put one dealing with a lunatic upon his guard. and it might well be held, that a

Commission issued was notice to all the world, and thereafter every act of a lunatic was void.

But confinement within the walls of a mad-house, and chains and uncontrollable frenzy are notices equally clear and equally conclusive to every one doing business with such a lunatic, and shall he be bound by his acts because he has not the sanity required to procure the issuing of the Commission?

What would be the result, if any lunatic escaped from the Asylum could enter the first lawyer's office and make a valid power of Attorney? Will the decision of any Court uphold a title so derived?

The only question left is—have we mistaken our remedy? Should we have filed our Bill in Equity instead of bringing ejectment? This defence is purely technical and must be met by adjudged cases.

If a man has no reason—there can be no "assent of two or more minds," which is essential to every contract. The act performed by a person having no reason is absolutely void. It may not be apparent that the act was void until the lunacy is proved, but when it is proved to have existed when the act was done, then the act was void, *ab initio.*

It was not *voidable* because the defendant did not know it was void. In other words the ignorance of the defendant that the act was void, does not change the character of the act and make it voidable.

That a power of Attorney made by a habitual lunatic is absolutely void has been held, and I have found no case to the contrary.

If cases could be shown in which *deeds* have been held not void, the error arose from following a mistake of Blackstone.

This mistake is pointed out by Sugden.

2 Sugden on Powers, p. 179.
Thompson *v.* Leach, 3 Mod. 301, Comb. 468.
Yates *v.* Boen, 2 Str., 1104.
Ball *v.* Mannin, 3 Bli, 1.

Again.—There is a distinction to be drawn between a deed and a power of Attorney.

The contracts and deeds of infants are not void, but voidable. If they do not dissent within a reasonable time after coming of age the deed cannot be avoided, but a warrant of Attorney has always, been held absolutely void.

Lawrence *v.* McArter, 10 Ohio, 37.
Pyle *v.* Cravens, 4 Litt., 17.
See also Zouch *v* Parsons, 3 Burr, 1804.
Thompson *v.* Leach, 3 Mod., 302.

The reason is stated in 1 Am. Ld. Cases, 254–5.

4th Exception.—This exception was taken to the ruling of the Court admitting the following evidence:

"Ques. Who, if any one, recommended his, John Hall's going to the Asylum?
Ans. Both of his physicians, I have named, in which opinion all his family and friends concurred." Rec. fol. 60.

This evidence was objected to as being matter of opinion—not of fact.

(*a.*) The question asked did not relate to the insanity of Hall—and the opinion given was not an opinion concerning the state of Hall's mind.

It was merely a statement that the family and friends concurred in the recommendation of the physicians as to the disposition to be made of Hall.

The *recommendation*, although loosely stated by the witnes as an *opinion*, was a *fact*.

Had the objection been that the evidence was irrelevant, it might have been entitled to weight.

That objection was not taken, and the plaintiff here is restricted to the points of objection made at the trial.

It is sufficient, that the answer was not an expression of opinion on the state of John Hall's mind.

5th Exception.—Requires no argument.

Record, folio 61.

6th Exception. Record, folio 77.

A physician having stated that he had read carefully all the testimony in this case, relating to the sanity and insanity of John Hall, was asked :

" From the facts stated in these depositions and the " symptoms, stated, what in your opinion, was the state " of John Hall's mind, in Decemcer 27, 1852, as to sanity " or insanity."

Objection was taken to an opinion founded on the evidence for both plaintiff and defendant, on the patent ground that the witness would be usurping the province of the jury, and endeavoring to forestall and determine the verdict. The testimony was excluded, and the defendants excepted.

The principle is well settled, that a physician might have testified to his opinion on a hypothetical case—but not on the one being tried.

Sills *v.* Brown, 9 C. & P., 601.
1 Vol. Greenlf Ev., § 440.

The physicians offered by defendants did testify for the defendants, and on the evidence of plaintiffs below alone, they all swore Hall was sane when he executed the power.

7th Exception. Rec. fol. 86.

This was an exception to a ruling, on a request to charge, that unless Hall was insane and totally deprived of reason, and said power of attorney was executed while in that condition, the Jury were bound to presume that Hall was of sound mind.

The request was refused because the true rule was already sufficiently laid down in the charge. See Record, p. 35 and top p. 36.

Ball *v.* Mannin, 3 Bli., 1
Creagh *v.* Blood, 2 Jo. and La., 519–20.

8th Exception. Record, fol. 86.

The request to charge, "that the Jury must be satisfied "there was a total want of reason at the time of the exe- "cution of the power," was overruled.

The true rule is given in the Record, pp. 35 and 36.

9th Exception.

The request to charge that the deed was voidable only, and the defendants being innocent, *bona fide* purchasers should be protected, was denied.

This point has been already considered under the 3d exception.

The power was void.

10th Exception.

The request to charge in substance that if the plaintiff in Error was ignorant that the power was void, he must be protected, was overruled as too general. Rec., p. 30, fol. 87.

We do not suppose that this is the law when applied to the circumstances of this case.

11th Exception. Rec., fol. 88.

The request to charge that the evidence, showing insanity at the time of the execution of the power, must preponderate, or the legal presumption of sanity must prevail, was overruled.

This ruling was correct, because if the plaintiff had previously established habitual insanity, that evidence had to be taken into the account, and the legal presumption of sanity would be thereby removed, until restored by proof of a return to reason.

Other Exceptions.

The remaining exceptions to the charge are stated on pages 41, 42 and 43 of the Record.

They are either exceptions to the statement of the facts proved, or exceptions to statements of the law already considered, or if not, they are such as require no consideration in this Court.

NEW YORK, November 10, 1869.

Respectfully submitted,

PHILIP G. GALPIN.

Of Counsel for Defts. in Error.

KILBOURNE TOMPKINS, Printer, 16 Cedar St. N. Y.

U. S. Supreme Court.

HENRY S. DEXTER,
Pl'ff in Error,

vs.

MARY K. HALL,
et. al. Defts. in Error.

DEFENDANT'S REPLY TO PLAINTIFF'S POINTS.

I.

The Statute of Limitations of 1855 was pleaded, but being abandoned below, no ruling upon it was asked. The Statute of 1864 was there relied on. In this Court the Statute of 1864 is in turn abandoned, and that of 1855 is now relied on.

The Statute of 1855 is inapplicable, because this case comes within its exception or proviso.

The Statute provides that "no action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within five years before the commencement of such action; provided however that an action may be maintained by a party claiming such real estate, or the possession thereof under title derived from the Spanish or Mexican Governments, or the authorities thereof, if such action be commenced

within five years after final confirmation of such title by the United States or its legally constituted authorities."

Stat. Cal., Ap. 11, 1855, p. 109.
Hittel's Digest Statutes, § 4348, note.

The title of John Hall was derived from the Mexican or Spanish Government, through a grant from the Pueblo of San Francisco.

"The language of the proviso clearly covers every case "of title derived from the Spanish or Mexican Govern- "ments, then (1855) existing in contemplation of law. "There is no room for supposing that any class of cases "was omitted, to be provided for in some other section."

Richardson *vs.* Williams, 24 Cal., p. 300.

"The exception applies in cases in which the defendant "claims *under the same grant*, and does not contest the "validity of the Spanish or Mexican title."

Ib., page 304—5.

That the title of the Pueblo of San Francisco, under which the plaintiffs below claimed, is derived from the Spanish or Mexican Governments is no longer an open question.

Townsend *vs.* Greely, 5 Wallace, 333.
See also *decree of confirmation*, of the Circuit Court of the United States, for the Districts of California, in case of United States *vs.* City of San Francisco, dated May 18th, 1865.
Grisar *vs.* McDowell, 6 Wallace, 363.
Act of Congress, March 6th, 1866.

That the title of the City was not cofirmed until 1865 by the Circuit Court, or perhaps until 1866 by Act of Congress, was proved on the trial.

See Davis *vs.* Davis, 26 Cal. p., 45.

The action was brought within five years after such confirmation, and the Statute of 1855 is no bar.

Again so far as the Record shows, the Court below may have instructed the jury that the Statute of 1855 did apply—if there was an adverse possession by defendants for five years preceeding suit brought.

The jury may have concluded that the plaintiff's ancestor, predecessor, or grantors had an actual possession within five years before bringing the action, and so the Statute did not apply. This, the jury had a right to find; and as the evidence on this point is not all here, this Court cannot reverse because the verdict was contrary to the weight of evidence.

II.

The argument contained under the 2d point of plaintiff's brief, that "if the instrument had not been a power of attorney, but had been a contract for the sale of land, it might under some circumstances have been enforced by the lunatic or his representatives in a Court of Equity; or possibly against him or them, is fully met by the fact that this power of attorney was not an *executory* contract."

The rules of law applicable to contracts of infants are different from those applicable to deeds, and those applicable to deeds are different from those applicable to powers of attorney. So it is with the contracts, deeds and powers of lunatics.

The effort of Equity is always to protect the interests and property of lunatics. They are under the care of the Court, and according as it is for their interest, the Court declares their contracts void or voidable.

But suppose the power of attorney was voidable—does it follow that it could not be avoided but by a bill in Equity? The old practice was to avoid by entry; the modern, by the action of ejectment.

The judgment in Ejectment avoids the deed or the

power if voidable, to the same extent as would the decree in Equity.

Again while we contend that the deed of a lunatic is absolutely void, we also claim that the privilege of asserting that it is void, is, like infancy, a personal privilege, and can only be enjoyed by the lunatic and those who claim under him.

This distinction alone was sufficient to have decided the following cases cited on the brief for plaintiff in Error, page 5.

Jackson *vs.* Gumaer, 2 Cow., 552.
Ingraham *vs.* Baldwin, 12 Barb., 9.
Same *vs.* same, 9 N. Y., 45.

The remainder of the cases cited under this point down to Chew *v.* Bk. Baltimore, are various cases where a Court of Equity has decreed the specific performance of contracts notwithstanding great lapse of time. We do not dispute the law contained in them.

Chew vs. Bank of Baltimore, 14 Md., 299, was a case of a bill filed in equity to set aside the power of attorney of a lunatic, and to declare certain sales of bank stock made under it fraudulent and void.

This case certainly shows that if we had brought an action in equity, we might have succeeded. The remarks on pp. 318 and 319 are especially applicable to this case. Here, as there, the heirs have never received any portion of the money arising from the sale.

The case of Somers *vs.* Pumphrey, 24 Ind., 231, is decided on that of Crouse *vs.* Holman, 19 Ind., 30; and the latter evidently stands on the mistake of Blackstone, corrected by Sugden, as before shown.

In any event, the decisions are, that deeds are voidable, and not that powers of attorney are, and the distinction between the two has been previously pointed out. The other cases cited under this point scarcely warrant the conclusions drawn from them.

As to whether, under that power of attorney the defendants could have laid the foundation for an adverse possession mattered not, for under the Statute of 1855, there was no chance for defendants to establish any such defence. The plaintiffs below came within the proviso, and the Statute did not apply.

III.

As to point VI., in plaintiff's brief, it may have been immaterial to the jury who the person was who recommended Hall's going to the Asylum, and if the objection of irrelevancy had been taken, the question might have been excluded. After arguing and stating one objection in the Court below, the party objecting cannot shift his ground and take a different objection in the higher Court. He should not be allowed to do this if the evidence admitted could not have prejudiced him. The testimony of the physician, the family and friends, in regard to the specific acts of Hall on which they founded their opinion of his insanity were given in the case as detailed in the charge to the jury.

IV.

As to point IX of defendant's brief, aside from the fact that the ruling was correct according to the authority cited by us in our brief, it may be remarked, that it is clear from the record that the ruling, if erroneous, did not prejudice the defendants below—for each and every of the witnesses offered, testified that they "had read and "carefully considered all the facts and symptoms detailed "by the plaintiff's witnesses as to the sanity or insanity "of John Hall from the year 1850 to the time of his "death in 1860, and that in their opinion, as medical

"men of large experience in the practice of their profes-
"sion, from said facts and symptoms, John Hall was ca-
"pable of doing business, and of executing a power of
"attorney before, at, and after the date of the power of
"attorney from John Hall to James W. Harris, and du-
"ring said time may have lucid intervals. And that in
"cases of the kind indicated by the testimony of the
"plaintiffs, it is usual for the patient to have lucid in-
"tervals, and that such a case as John Hall's appears to
"be from the testimony, rarely occurs, if ever, without
"lucid intervals."

Record, fols. 77 and 78.

It will be seen that the defendants below had the full benefit of the professional opinion in their favor on the plaintiff's evidence alone, so that their case was in no way prejudiced by the ruling.

The evidence offered was the opinion of the doctors. It was allowed to go in. It was in favor of the defendants.

The objection is, that the doctors were not allowed to base their opinion in part upon Broadhead's deposition.

That they were not, did not weaken or change their evidence.

Indeed, the objection of the plaintiffs was no doubt to the defendants, a blessing in disguise, for if those learned members of the faculty had been permitted to read the only evidence for the defence, that of Broadhead, in which he swears that when Hall executed the paper, "he did not write his signature right at first," but "my impression is it was another name—not esquire, nor any title—some other name."—record, 70–71—they might have been shaken in their conviction as to Hall's sanity.

As the evidence excluded, not from the jury—but the doctors—did not prejudice the defendant's case, no new trial should be granted.

As to the fact that the Record shows a judgment in favor of but three plaintiffs, while the same judgment shows the verdict was rendered in favor of all the plaintffs; this was an error of the copyist who prepared the Record for this Court. The original judgment is correct, or if not, it can be corrected by the judgment itself, which contains the verdict.

This is palpably a mere clerical error, to correct which, if it exists, no new trial is required.

There are technical objections to the writ of error itself, but we have not presented them, as we desire a judgment on the merits.

Respectfully submitted,

PHILIP G. GALPIN,

Of Counsel for Defendants in Error.

New York, December 6, 1869.

Supreme Court

OF THE

UNITED STATES.

HENRY S. DEXTER,

PLAINTIFF IN ERROR,

against

J. LADSON HALL, et al.,

DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS.

HALL MCALLISTER, of San Francisco, Cal.,
ROBERT G. PIKE, Middletown, Conn.,
PHILIP G. GALPIN, New York,

Of Counsel.

New York:
POLHEMUS & PEARSON, PRINTERS, NO. 114 FULTON ST.
1871

Polhemus & Pearson, Printers, 114 Fulton Street, N. Y.

Supreme Court

OF THE UNITED STATES.

HENRY S. DEXTER,
Plaintiff in Error,
against
J. LADSON HALL, and others,
Defendants in Error.

In Ejectment.

BRIEF FOR DEFENDANTS IN ERROR.

1. Is a Power of Attorney made by a Lunatic void or voidable?

2. If voidable, may it be avoided at law?

STATEMENT OF FACTS.

The grantors of the plaintiff in error, pretending to no title, acquired possession of a large tract of land in the City of San Francisco, June 5th, 1852. (Record, fol. 16). In December, 1852, John Hall, the owner, a

lunatic confined in a mad-house near Philadelphia, while within its walls, executed a power of attorney to Jas. W. Harris. days afterwards, Harris, in New York, substituted Rising, in San Francisco, as attorney for Hall. days afterwards, Rising, acting under this power, and in the name of Hall, conveyed the premises to the grantors of the plaintiff. The dates of these transfers do not appear in the case as made up, but the answer (Record, fol. 17) shows that the Hall title was vested in grantors of plaintiff, prior to April 5, 1853. No consideration for this deed was received by Hall or his family. As to the equities, the theory of our case is, that the grantors of the plaintiff being in possession, made use of Harris and Rising to get in Hall's title

The lunatic died at the asylum, and his children, infants, all, at the date of the power, and some, not yet of age, brought ejectment. The plaintiff in error proved his deed under the power of attorney, and the defendants here, then proved the lunacy of their father. Judgment was for the defendants here, on the ground that the power of attorney and the deed under it were *invalid at law.* All of the defendants below paid the heirs for their respective titles, except Dexter, who sued out this writ of error. Upon Dexter's portion, the sole "improvement" (see brief of opposing counsel on former argument, pp. 2, 4, 15) consists of a *board fence.*

After the argument, at the last term, the Court ordered us to re-argue these two

QUESTIONS OF LAW.

1. Assuming that John Hall, who signed the power of attorney in the case dated 27th December, 1852, was at the time insane, whether or not said

power was void and of no effect in the hands of James W. Harris, the attorney ? and,

2. Whether or not the deed given in pursuance of said power is void.

These questions are asked upon the theory :

1st. That the power and deed of Hall may have been voidable.

2d. That being voidable, the defendants have not avoided them ; for, if they were originally void, or, if being voidable, they have been avoided, defendants here should recover.

I.

The Power and Deed were both Void.

As to the meaning of void and voidable.—With regard to their *nature* and *effect*, all legal acts and conveyances intended to pass a title may be divided into three classes : those which are void; those which are voidable; those which are valid. Void acts are nullities. Voidable acts are *prima facie* valid, and appear to convey title, but owing to inherent defects, may be avoided at the common law; if so avoided, they become nullities from the beginning, but if not avoided, they remain valid. Valid acts are good until the decree of a Court of Equity, *operating* on the act or instrument, annuls it or changes its effect. A void act passes no title. A voidable act passes, or appears to pass it, until avoided. A valid act passes the title, but it may be divested by a decree in equity: this decree usually spends its force on the act or conveyance and the parties to it.

In Allis *v.* Billings, 6 Metcalf R. 417, Justice Dewey says: "The term void, as applicable to conveyances or other agreements, has not at all times been "used with technical precision nor restricted to its "peculiar and limited sense as contradistinguished from "*voidable*; being frequently introduced, even by legal "writers and jurists, where the purpose is nothing "further than to indicate that a contract was invalid "and not binding at law. But the distinction between "the terms void and voidable, in their application to "contracts, is often one of great practical importance, "and whenever entire technical accuracy is required, "the term void can only be properly applied to those "contracts that are of no effect whatever, such as are a "mere nullity and incapable of confirmation or ratification." A contract which is contrary to public morality is absolutely void. The contracts of a lunatic made after office found are absolutely void. So the marriage of a lunatic is absolutely void at the Common Law. "It is a well known principle of our law that, although voidable for some canonical disabilities (such as consanguinity, affinity, &c.), it (marriage) is not void until sentence of nullity has been declared, and it is considered valid and operative for all civil purposes unless such sentence is actually declared during the life-time of the parties. But civil disabilities, such as prior marriage, want of age, *want of reason*, and the non-observance of certain solemnities required by the marriage act, render the contract of marriage not only voidable but absolutely *void ab initio*."

2 Phil. Ev., 286.
Turner *v.* Meyers, 1 Hazzard Cons., 416.
2 Kent, Com., 76.
Wightman *v.* Wightman, 4 John Ch., 344.

Why the power is void.—We claim that the power of attorney was originally void, from

PRINCIPLE, PRECEDENT, ANALOGY AND NECESSITY.

1st. PRINCIPLE.—There can be no power of attorney executed without reason, for the authority delegated is an authority to contract, and to convey, and, as he who has no reason can neither contract nor convey, he can delegate no such power. *Qui facit per alium facit per se*, but he who by himself cannot do a certain act, cannot do it by another.

There can be no contract, except there is an assent of two or more minds to do or not to do a particular thing. A "*non compos mentis*, within the legal acceptation of the words" has no mind, and it is as impossible for an express contract to exist between such an one and a person having reason, as between a brute and a man. Thus in Osterhout *v.* Shoemaker, cited in a note to Blanchard *v.* Nestle, 3 Denio, 37, the judge charged the jury that in order to avoid the deed of a lunatic, the plaintiff must show the grantor was "*non compos mentis*, at the time of its execution, *within the legal meaning of the term*;" that there must have been a total and entire, and not a partial, want of reason and understanding, in order to authorize the avoidance of a deed; that, unless the testimony showed the defendant to have been an idiot or lunatic, deprived of reason and understanding at the time of the execution of the deed, the plaintiff had failed to sustain the action.—(See also Odell *v.* Burke, 21 Wend., 142; Peters *v.* Shoemaker, 24 ib. 85). In the great case of Ball *v.* Mannin in House of Lords, 1829, (1 Dow & Clarke, 380,) a deed was held

invalid at law, although the grantor was not a lunatic. The Court evidently considered that the grantor's imbecility of mind so nearly approached idiocy, that he was "*non compos mentis* within the legal acceptation of the term."

A lunatic is not amenable to the criminal law, for, as he has no reason, the criminal law does not apply to him.

So, too, "when a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not *sufficient capacity to know* that it is wrong." (Rex *v.* Elisabeth Owen, 19 Eng. Com. Law R., 363). But if a lunatic has not sufficient intelligence to make him responsible for crimes, shall he be held responsible for a delegation of authority? The very statement that a man has no reason, precludes the idea of his exercising reason; and he cannot appoint an attorney because the appointment itself requires the exercise of reasoning powers. This proposition is felicitously stated by Bracton:

> "Furiosus non intelligit quid agit et animo et ratione caret, et non multum distat a brutis." Beverly's Case, 4 Coke, 124.

To come from the earliest to one of the latest cases, in the Mordaunt divorce suit, the plaintiff was stayed in his action, because the defendant, being a lunatic, had no reason with which to select and appoint an attorney to defend her.

By the common law, a married woman was utterly incapable of making a contract, for she was supposed to have no will; whatever individual opinions upon that subject may be, the law presumed she had *no mind of her own*. Her coverture

could be given in evidence against her deed, under the plea of *non est factum*, for the deed, although valid upon its face, had no legal operation, and was absolutely void, ab initio. There is quite as much reason for holding void the power of attorney of a mad man, as that of a sane, married female.

The acts of infants, however, differ somewhat from those of lunatics and married women; for while the latter have no reason *acknowledged by the law*, infants have, and may bind themselves by their deeds and contracts. They have minds capable of exercising some degree of reason. There is no absurdity in supposing the minds of two infants to meet in a contract; there is, in supposing the minds of two lunatics to meet, who are presupposed to have no minds. But if a lunatic may make a contract with a sane man, he may make one with another lunatic; therefore, if a contract between a lunatic and a sane man may be valid, equally will that be between two lunatics. But, while the contracts of infants are not void. neither are they always binding; for, out of tender consideration for the immature reason of the infant, the law gives him time for repentance. He may change his mind after he comes of age, and revoke his deed, or he may ratify it. In fact, his deed is good if he does not dissent from it after he comes of age, within the period prescribed by the Statute of Limitations.

Drake *vs.* Ramsey. 5 Ohio, 251.

So, too, where a person is not non compos mentis, within the legal acceptation of the term, and yet has some imbecility of mind, his power or deed would be valid until revoked by a decree in equity. It is not to be denied that, in particular cases, it may be difficult to decide upon which side of the

boundary line between sanity and insanity a man may stand, but this is a question of fact for the jury. The law which governs either territory is not uncertain because the proper location of the individual person may be. If he is a lunatic, the contract is void at law; but if he is only of weak understanding, it may be avoided in equity.

The principle for which we contend, viz., that the acts of a lunatic are absolutely void, is attested by all the decisions of the English and American courts, until within a comparatively recent period: That a man presupposed to have no reason can perform reasoning acts, is a discovery of very modern date.

The earlier English lawyers, who trusted more to logic than to cases, made no such mistake. Consider the reasoning of the Court in Beverley's case, 4 Coke, R. 124.

It desired to make the act of the lunatic binding; but, instead of adopting the "modern improvement," That a "lunatic could and did bind himself by the exercise of a reason which he did not have," the Court held, in effect, that although the act of the lunatic was void, in its *operation*, for want of reason to make it, yet, as it was a principle of the English law, that a man should not stultify himself, the lunatic was estopped from proving his lunacy. The existence of the maxim being conceded, the logic was faultless, and the same result was reached as if they had held that a man without reason was capable, by the exercise of reason, of binding himself. The recourse had in this case to the law of estoppel, proves that the Court considered the act, *so far as its own nature* was con-

cerned, as being absolutely void. Subsequently, this maxim was swept away, and the lunatic was permitted to avoid his deed by the writ "dum fuit non compos mentis." But, it may be said, If the deed of a lunatic is absolutely void, why is the writ given to avoid it? The fact that the lunatic must avoid, shows that, prior to the issuing of the writ, the conveyance was voidable only.

The answer almost suggests itself. The law presumes every man to be sane, until the contrary is proved in a court of justice. The law, therefore, presumes the deed of every lunatic to be valid, until the deed is attacked in Court, and proof of lunacy is made. In fact, then, the deed which is, and was from the beginning, absolutely void by its nature, stands by presumption of law as valid until proof of lunacy made. This deed, therefore, was not operative in its *own nature*, but solely by force of the presumption of law. If this deed never was attacked, by any person, at any time, it would have had the same effect as if it had possessed vitality to convey the title. So would a forged deed, whose validity was never questioned. If, then, the writ "dum fuit non compos mentis" was essential to avoid the deed, it was so because the presumption of law, and not the reason of the grantor, had given such deed an apparent validity. In this sense, then, as being *prima facie* valid, by force of a legal presumption, but susceptible of proof of nullity in its inception, the deed may be said to be voidable. This is all that is meant by saying that the deed or act or contract of a lunatic is voidable.

But, it will be said, the Common Law lawyers of early times held that certain conveyances bound the

lunatic, as, for instance, a feoffment with livery of seisin. That is true, but such cases are further evidence of the truth of our theory ; for those lawyers, instead of claiming that the feoffment was valid, because of the ability of the lunatic to make a deed, once more had recourse to the same law of estoppel. After the plaintiff had proved the feoffment, which, by force of the above-mentioned presumption of sanity was valid, they refused to let the lunatic *prove* his lunacy ; saying, he was "estopped "by the solemnity of the act from averring any-"thing against it." Thompson *v.* Leach, Comberbach R., 469. So, too, in case of a statute, merchant or staple, the lunatic was not allowed to *prove* his lunacy, to avoid them, for, it was said, "he was "estopped from averring anything against the "record." 12 Petersdorf, 592. In all the above cases, in which the conveyances were held binding, it was not on the ground that in *their nature* they were voidable, so as to be capable of ratification, but on the ground that although void, the grantor was estopped from showing it. But as to all other conveyances, excepting those referred to, the Courts not only held the conveyances void, but refused to apply this doctrine of estoppel, and consequently allowed the lunatic or his representatives to prove they were void.

We will remark here, however, that while the lunatic and his representatives were allowed to prove the lunacy, yet, as against all others, the same bar of estoppel was once more put up : and it was held that lunacy, like infancy, was a *personal* privilege which could not be pleaded by strangers. Here we have again the same law of estoppel invoked to protect the presumption in favor of sanity, and consequently of the validity of

the conveyance. That lunacy is a "personal privilege" see Beverly's case, 4 Coke, 124. It is intended for a shield to the lunatic, not for a sword for the benefit of strangers.

There is a class of cases frequently cited as against our position which may properly be considered and disposed of here. They are such as Jackson *v.* Gumaer, 2 Cow., 552; Ingraham *v.* Baldwin, 12 Barb., 9; *ib.*, 9 N. Y., 45. These are suits brought on a title to real estate, or personal property, derived from a lunatic, and the defendant has set up the lunacy to *defeat the title*, claiming that, as the act of the lunatic was void, no title passed, and the plaintiff could not recover. Courts have seen the injustice of allowing the plaintiff's just claim to be so defeated, and, at the same time, have thought that, if they held the conveyance or contract void, such would be the result; and so, to escape a dilemma, more apparent than real, they have said the conveyance was voidable only. Whereas, had they said, "lunacy is a privilege, personal to the lunatic and his representatives, and given for his and their protection, and, whether he was a lunatic or not, is of no concern to the defendant, as he is estopped from proving lunacy," the cases would not only have been decided according to law, but also according to logic. The case of Burke *v.* Allen, 9 Foster R., 107, was a suit on a promissory note endorsed by the lunatic to the plaintiff, and the Court allowed the defendant (a stranger) to plead lunacy and held the endorsement void, assigning as a reason for so holding, the necessity of protecting the property of the lunatic. In this case, the Court did not invoke the law of estoppel against the stranger.

There are other classes of cases where courts have said the contracts of lunatics were voidable. They are of three kinds. 1st, Where lunatics have purchased necessaries; or, 2d, Where they have entered into contracts which, in good faith, they ought to be compelled to perform, because they have received the consideration; or, 3d, Where it is for their interest to have contracts specifically executed which they have made, and the defendants have refused to perform. Bagster *v.* Earl of Portsmouth, 7 Dowl. & Ryl., p. 618; Pearl *v.* McDowell, 3 J. J. Marsh, 662, are fair specimens of cases of the first class. In Bagster *v.* Earl of Portsmouth, the Earl had hired and used carriages "suitable to his condition in life," and when sued for the hire, defended on the ground of lunacy. Three judges of the court of King's Bench likened the case to that of an infant, and came to the conclusion that, although lunacy was proved, yet "this contract being for necessaries, he should be bound." This is a remarkable instance of how courts, carried away by the clear justice of a case, may assign a most absurd reason for a decision clearly sound. This decision, if correct, makes the ability of the lunatic to contract, to turn upon the extravagance of his purchase, and not upon the existence or non-existence of reason. Tried by this test, many of us should be imprisoned in a mad-house, who are still at large. The necessity of holding a lunatic bound by his contract for necessaries is plain enough, for if he is not, he may sometimes suffer for the necessaries of life, from being deprived of credit with which to obtain them; and, as the "end of all rules of interpretation is to protect him and his property" (Zouch *v.* Parsons, 3 Burr, 1804), all persons should be encouraged to assist him in distress. We submit whether it would not have been more in accordance with established precedent,

in the court where those learned judges sat, as well as more in accordance with the philosophy of the law, had the Court put the decision on the ground that, although the express contract was absolutely void, by reason of the lunacy of the defendant, yet, as the defendant had had the necessaries, the law, in such a case, would imply a contract to pay: and as the law would never imply a contract, where it was not for his benefit, it would leave it with the Court to say, according to the circumstances of each case, whether, in the absence of all power on the part of the lunatic to make a contract, the law made one for him or not. Or, after the plaintiff had proved the hiring of the carriages, the court might have said to the defendant, "as these were necessaries suitable to your condition in life and beneficial to you, you shall be estopped from proving your lunacy." This latter ground would have been in strict harmony with all the former cases where the law of estoppel has been invoked—but the existence of an implied promise made by the law, was the one on which the case of Pearl *v.* McDowell, was decided. 3 J. J. Marsh R., 662.

The second class of cases, where lunatics have entered into contracts which they ought to be compelled to perform, because they have received a consideration they cannot restore (if any such can be found by my very learned and distinguished opponent) ~~are~~ not of necessity to be considered voidable, so as to be capable of ratification by him. They are no doubt absolutely void, if the defendant is allowed to prove his lunacy. But such actions must, of necessity, be brought in a Court of Equity, which is the especial guardian and protector of lunatics; and if convinced of the equity of the plaintiff's claim, a Court might refuse to permit the defendant to prove

his lunacy: the result of which would be, the plaintiff would recover, and yet the contract would not be valid in its *nature*.

In the third class of cases, where the lunatic sues on such a contract, the defendant could not defeat the contract, because, the privilege of lunacy being personal to the plaintiff, he could not avail himself of it to defeat the claim. I have not found any cases of the second and third classes, but if such exist, they do not, of necessity, determine that the conveyance of a lunatic has in *its own nature* any operative effect, because they could be decided on the ground stated. The case of Whitney *v.* Green, 14 Mass. R., 462, has been referred to as showing that a power of attorney of an infant was sometimes voidable. The case was this. The two defendants (one of whom, Green, was under age) were partners in business. The adult partner signed the copartnership name "Dutch & Green" to a note, on which suit was brought. Green pleaded infancy, and claimed he could not delegate to his copartner power to sign his name, because he could not constitute an attorney. It was conceded, that if Green had signed it himself, he would have been bound, because he had ratified the contract after coming of age. The naked question was whether the power to sign was void. The Court held that "if the authority required a letter of attorney under seal, the exception would be supported by the authorities." But it is well known that copartners may, and generally do, undertake to bind each other without any express authority—and they proceeded to put the right to sign the name, not on the ground of a power expressly conferred by a letter of attorney, but on an implied power necessarily incident to and inherent in the nature of the partnership

contract; and as the contract of copartnership was not void, but voidable, the authority conveyed in, and which was a part of, the contract, was not void but voidable. This was substantially the ground of the decision.

On principle, all conveyances, deeds, and contracts of a lunatic are, in their nature, absolutely void, and not susceptible of ratification, because the lunatic had no reason with which to make them; but, in consequence of the presumption of sanity, all conveyances, deeds and contracts are presumed valid; and where Courts consider it *for the benefit* of the lunatic, they make use of the law of estoppel, to prevent him, and also to prevent others, from proving, that these *prima facie* valid instruments were, from their nature, void.

2d. PRECEDENT.—In the earlier periods of the English Common Law, all conveyances were divided into two general classes.

1st. Those which take effect from delivery made, *propriis manibus*, such as *feoffments with livery of seisin*.

2d. All other conveyances, such as surrenders, grants, deeds, powers of attorney, etc.

In the time of Beverly's Case, 4 Coke, 124, whatever was the form of the conveyance, whether by feoffment, by grant, or under a power of attorney, it was conclusive upon the *lunatic*, by reason of that law of estoppel which prevented his proving his own lunacy; the maxim was, that "no man should be allowed to stultify himself."

Upon the death of the ancestor, a distinction became apparent between a feoffment made in person, and by letter of attorney; for, as is said by the Court in that case "As to estates or gifts made "by them (lunatics), *they themselves*, by any plea "they can plead, shall not avoid them, no less the "idiot than he who becomes of unsound memory, "and be the feoffment a gift made by them in per- "son, or by attorney; they themselves shall never "avoid them, either by entry, or *by action*, for it "appears by said maxim that they cannot stultify "themselves. But yet, as to *others, there is a* "*great difference between an estate made in person* "and *by attorney*, for, if an idiot or non compos "makes a feoffment in fee, *in person*, and dies, his "heir within age, he shall not be in ward. But if "*the feoffment is made by letter of attorney*, "although the feoffor shall never avoid it, yet, after "his death, *as to all others* in judgment of law, the "estate was *void*."

Subsequently, the law was so far modified that lunatics were permitted to plead and prove their lunacy; and a Common Law writ was allowed them, by which to recover their estates, known as the writ, "Dum fuit non compos mentis."

See Fitzherbert, "De natura Brevium," 202 F.

Under this writ, however, the feoffment with livery of seisin was held voidable only, because "of the solemnity of the act," and also because that "the delivery was made, propriis manibus;" but all *other conveyances*, not only powers of attorney, but all surrenders, deeds and grants made by the lunatic were *void*.

The leading case is that of Thompson *v.* Leach, Carther, 437. The heirs of the lunatic brought ejectment. The defendants offered a deed made by the lunatic. "The question upon the issue was, "whether the deed was void ab initio, or only void-"able by way of plea, or by scire facias, for "the King, in the life-time of the lunatic: for if it "was at *any time effectual* to merge the tenancy for "life of the father, Leach, before the birth of his "son, then the contingent remainder would be "destroyed, and, though this surrender should af-"terwards be avoided by any means in law, yet the "contingent remainder, being once extinct, could "not be revived by any matter ex post facto. There "is a difference between a feoffment and livery made "propriis manibus of an infant, and the bare exe-"cution of a deed by sealing and delivery thereof, "as in cases of *grants*, surrenders, releases, etc., "which have *their strength only by executing them*, "and in which the formality of livery of seisin is "not so much regarded in the law, and, therefore, "the *feoffment* is not merely void, but *voidable*, "but *surrenders*, *grants*, etc., by an idiot, are *void* "ab initio." The same case is reported in Comberbach R., 469, where it was said, "There was no "necessity for the heir to have *a scire facias to* "*avoid* the feoffment of his ancestor, made during "his lunacy, he may enter without it, because, *by* "*the death* of the ancestor, the title which the "feoffee claimed under him *is determined.*" And again, "But if an infant grants a rent-charge and "the grantee distrains, he may have trespass, "which plainly proves that the grant is *void;* for, "if only voidable, that requires *some act to be done* "*to avoid it;* and the same law holds in *case of a* "*non compos mentis.*" Again, "The reason why "the *feoffment* of an idiot or non compos is only "voidable is, because of the solemnity of the liv-

" ery, being done upon the land and in view of the " country; and the feoffee might have, afterwards, a " confirmation of his title by way of release and " warranty, etc. Therefore I hold the surrender " in this case to be void."

Yates *v.* Boen, 2 Str. 1104, was an action of *debt* on articles; the plea was *non est factum;* lunacy was offered in evidence. If these articles had been voidable, it would have been necessary to plead lunacy specially; but if void, lunacy was competent under the plea: the Chief Justice was at first inclined to exclude it, but, upon consideration of Thompson *v.* Leach and Smith *v.* Carr, he admitted the evidence, and the plaintiff was defeated.

" Lunacy may be given in evidence under the " *general issue;* or it may be specially pleaded." —1 Ch. Pl., 470–474.

" Under the issue of non est factum, excessive " drunkenness at the time of signing may be given " in evidence."—Cole *v.* Robbins, Bull N. P., 172.

" A woman may, under it, give her coverture in " evidence," (Cole *v.* De Laune, 3 Keb., 228) " but " that which will only prove the deed to be void- " able as that of infancy cannot be taken advant- " age of under it."—Gilbert, Law of Ev., p. 165, " 12 Vin. Abr., 151.

" The distinction between the deeds of feme " coverts and infants is important; the first are " void, the second voidable."—Zouch *v.* Parsons, 3 Burr, 1805.

The case of Ball *v.* Mannin, House of Lords in in 1829, 1 Dow and Clark, 380, affirms the doctrine of Thompson *v.* Leach. John S. Ball, in 1785, conveyed his title by fine, recovery and deed, to lead to uses, etc., being "at the time, of "an imbecility of mind from his birth, nearly ap- "proaching to idiotcy." His heir brought ejectment, and by "agreement between counsel, "the sole question presented was whether the "deed was *valid at law*" (p. 382). The judge charged the jury that "to constitute such unsound- "ness of mind as should *avoid* a deed, *at law*, the "person executing such deed must be incapable of "understanding and acting, in the ordinary affairs "of life," and refused to charge that the unsoundness of mind must amount to idiocy. The Court of King's Bench, in Ireland, in 1825, overruled the exception. A writ of error was sued out to the Court of Exchequer Chamber. They affirmed the judgment. Another writ of error to Parliament; grounds assigned, "that nothing short of lunacy, or idiocy, would *nullify* the deed." On the other hand it was contended, that "the unsoundness of mind was sufficient to *avoid the deed at law*." Cause heard in the House of Lords, 1829, and judgment again affirmed; opinion by Lords Tenterden and Plunkett. The question, as stated by the Lord Chancellor, was, "whether the deed was *invalid at law*," and it was so decided to be. This is the precise question here. Notwithstanding an unbroken line of decisions from Beverly's case to Ball *v.* Mannin, and, indeed, to the present day, to the effect that the conveyance or power of a lunatic is invalid at law as against his heirs, Blackstone, having in his mind a conveyance by feoffment with livery of seisin, and overlooking the case of surrenders, grants, deeds, etc., erroneously laid it down in his commentaries as being law, that every deed

of a lunatic was voidable only, and not void. This mistake occasioned no error in England, as is seen from the decisions cited, but some American judges, following Blackstone, have been led into error; and, probably, no case can be cited, where such ruling is made, except this mistake is the authority relied on. This error is not only plain, from the cases cited, but is thus noticed by Lord St. Leonards, "In Yates *v.* Boen, a distinction has been established, which does not appear to have been attended to by writers on this subject, although they refer to the case. To debt upon articles, the defendant pleaded non est factum, and, on the trial, offered to give lunacy in evidence. On considering Smith *v.* Carr, 5 July, 1728, and Thompson *v.* Leach, the Chief Justice admitted it. Now, the history of the revolution in this branch of the law was this: When Beverly's case was decided, it was held that deeds executed by lunatics were voidable only, but not actually void, and therefore they could not be set aside by special pleading, and, by the rule of law, a party could not stultify himself: And Mr. Justice Blackstone, following the *old rule*, has laid it down that the deeds of lunatics are avoidable only, and not actually void (2 Bl. Com., 291); but in Thompson *v.* Leach, this distinction was solemnly established, that a feoffment with livery of seisin by a lunatic, because of the solemnity of the livery, was voidable only, but that a bargain and sale or surrender was actually void. THIS, therefore, was the ground of the decision in Yates *v.* Boen. When the Chief Justice remembered that an innocent conveyance or a deed by a lunatic was merely void, he instantly said that *non est factum* might be pleaded to it, and the special matter given in evidence, and this applies strictly to DEEDS EXECUTING POWERS. But in the case of a *feoffment*, the rigorous rule of the law prevailed until 7 and 8 Vict., c. 76, § 7, which en-

acts that no conveyance shall be voidable only when made by feoffment or other assurance where the same would be absolutely void, if made by release or grant." 2 Sugden on Powers, p. [179]. We are warranted, then, in saying, that in England, not only is there no precedent for holding a lunatic's power of attorney voidable; but, on the contrary, their statutes now make void those few peculiar modes of conveyance, which for two hundred years and more, as *exceptions to the common rule*, had been held to be voidable.

Some American judges, not having access to the English Reports, and relying upon the authority of Blackstone's great name, have been led astray. Others have decided contrary to his authority.

Thus, in 5 Rawle, p. 112 (Matter of DeSilva), Ch. J. Gibson says, "The authorities distinctly show, that the feoffment and livery of a lunatic or mad-man are not void, but voidable, etc. The defect in the argument is, that it fails to prove that a deed of *bargain and sale*, by which he holds, is equivalent *in all respects to a feoffment*, etc. At Common Law the feoffment of a mad-man, as shown upon the argument, is only voidable, but his *deed is absolu'ely void.*"

Rogers *v* Walker, 6 Penn. 371, was an action of ejectment by a lunatic. Ch. J. Gibson says, "The direction that the plaintiff might recover back the land conveyed by her, when insane, without restoring the purchase money, or compensating the defendants for improvements, was entirely proper. Since the time of Thompson *v.* Leach, Carth. 435, 2 Salk. 427, it has been held that a lunatic's conveyance, executed by sealing and delivery of it only, is

absolutely *void* as *to third parties*, and why not as to the grantor? etc. The plaintiff, therefore, had a clear title to the land, and what right had the defendant to control it in Equity? Only the right derived by his bargain with an insane woman, who is an object of protection in equity, as well as in law. No right can spring from a void and prohibited contract, and the defendant had none."

3d. ANALOGY.—The parallelism between the acts of lunatics and infants is recognized in all the books. This analogy is constantly recognized and acted upon by all Courts, both of Law and Equity, and it is generally upon the same grounds that the acts of both are declared to be void. Story, Eq. Jur., §§ 223, 224; Yates *v.* Boen, 3 Mod., 310; Zouch *v.* Parsons, 3 Burr, 1804. This analogy is also pointed out by Fitzherbert, in his comments upon the writ "Dum fuit non compos mentis." De Natura Brevium, 202 F. See, also, Beverly's Case, 4 Coke; Thompson *v.* Leach, 2 Salkeld, 3 Ld. Raymond, 310. In Seaver *v.* Phillips, 11 Pick., 304, it is said, "Idiots and insane persons "are entitled to as much protection as infants."

If infants are under the especial protection of the Court because of the immaturity of their reason, those who have no reason whatever are the more entitled to such protection, for, as was well observed by the Court in Burke *v.* Allen, 9 Foster, 107, "The contracts of minors are held voidable, "for the reason that they are supposed to lack that "discretion, prudence and experience which age "gives; but with a person who is really insane, "there is wanting the power to understand the "consequences of the acts done, and, in many

" cases, what was done." Infants *give* a *consent* but withdraw it; it is revocable. Lunatics can give no consent whatever.

In Pearl *v.* McDowell, 3 J. J. Marsh, 662, the necessity for extending to lunatics the same rules of protection as are given to infants is enforced by these remarks: "A lunatic is not permitted to "bind himself by contract, because incapable of "forming an opinion with respect to the propriety "of his contract. If left to himself he would soon "be stripped of his property by the artifice and "cupidity of designing men. Hence the compas- "sion with which the law regards his infirmities "and watches over his property."

In Zouch *v.* Parsons, 3 Burr, 1805, the question arose in an action of ejectment, whether an infant's lease and release was absolutely void or voidable only. Lord Mansfield, in this celebrated case, laid down the rules of construction to be applied to the deeds and writings of infants; but sums them all up in this pregnant sentence: "The *end* of the "privilege is to *protect* infants. To this object, all "rules and exceptions must tend." The two chief rules of construction laid down by Lord Mansfield in that case, *for the purpose of protecting the infant*, were these:

1. "All deeds, gifts, grants, surrenders, etc., which "do not take effect by delivery of his hand are "void." (Under this head he instances a letter of attorney, and expressly says it would be *void*, as also would be one made by a lunatic).

2. "An instrument will be declared voidable "when such construction would be beneficial

" to the infant—but if not, it will be declared " void." 2 Drury & Warren, 340; 1 Con. & Law, 453.

In Allen *v.* Allen, decided by Lord Chancellor Edward Sugden, in 1842, these rules of Lord Mansfield in Zouch *v.* Parsons were questioned at the bar, and the Lord Chancellor says: " In Zouch *v.* " Parsons it became necessary to consider what " was the true ground for holding the acts of infants " voidable only, whether the solemnity of the in- " strument, or the semblance of benefit to the in- " fant, on the face of the deed; as to the former " ground the Court thought fit to approve of Mr. " Perkins' distinction, according to which all such " grants, gifts, or deeds of an infant, as do not take " effect by delivery of his hand, are *void*, and those " which do, are voidable only. (See Perkins, Sec. " 12). But the Court decided the question prin- " cipally upon the latter ground, and held a lease " and release by an infant to be voidable," etc. He then affirms this distinction in Zouch *v.* Parsons. It would appear that Sir Edward Sugden was of opinion, that Lord Mansfield put his decision upon the proposition cited from Perkins, but as Lord Mansfield decided that the lease and release was voidable, he must have decided that the estate took effect from the delivery of the *deed*, and not of the land; but who would say that the estate passed, upon delivery of a power of attorney to convey? And if not, then the power was void in the hands of Harris. In fact, in that case, while Lord Mansfield held the lease and release were viodable, he said a letter of attorney would be void—void, too, upon this distinction taken in Perkins.

This distinction between the deed of an infant and his letter of attorney, is well stated by Reeves,

in Dom. Rel., p. 254. "Purchases by an infant "are voidable. Conveyances are voidable only when "they take effect by delivery, but if the *infant's* "*privilege* will not be sufficiently protected by con- "sidering them as voidable, they are void. Exec- "utory contracts are all voidable only. There is "no contract, executed or executory, but what is "voidable only, if *the contract has taken effect by* "*delivery*, excepting in cases of *delegated powers.*"

"Deeds and leases of land are voidable, but if the "nature of the instrument delivered be not such as "to pass an interest, then the instrument is void. A "power of attorney by an infant is void, for, by the "delivery of the power of attorney, no conveyance "of any property is made—only a power given to "another to do it." 1 H. Bl., 75, 3 Burr, 1808; 2 Lev. 144, 1 Salk., 279. "An infant cannot exe- "cute a power coupled with an interest." Hearle *v.* Greenback, 3 Atk. 695, 714.

In Ohio, such letter of attorney is void. Lawrence *v* McArthur, 10 Ohio, 37. In Kentucky, also. Pyle *v.* Craven, 4 Littel, 17. In Massachusetts, also. "Perhaps it cannot be contended against the "current of authorities, that an act done by another "for an infant, which act must necessarily be done "by letter of attorney under seal, is not absolutely "void, although no satisfactory reason can be as- "signed for such a position." 14 Mass., 462. In New York, the deed is voidable, but power of attorney void.

Boole *v.* Mix, 17 Wend., 135.
Snyder *v.* Spinach, 1 Hill, 567.
Conroy *v.* Birdsall, 1 John Cas., 127.
Fonda *v.* Van Horne, 15 Wend., 636.

From the earliest periods of the English Common Law to the present time, I have found no decision, either in England or America, that an infant's power of attorney is voidable only. This current of authority is not only unbroken, but its correctness has passed unquestioned, until in the 14th of Mass., 462, the Court, while admitting the law, finds no reason for it. This reason is supplied in 1 Am. Ldg. Cas., note, p. 254, to which we will presently refer.

Further, a power of attorney is not the only instrument executed by an infant which is void. The following acts are nullities, and incapable of ratification :—1. Warrant of attorney authorizing conveyance of land ; 2. A confession of judgment ; 3. His cognovit for same purpose, although the action was wholly for necessaries : 4. His appointment of an agent ; 5. His bond, with a penalty for the payment of interest ; 6. A release to a guardian ; 7. His contract of suretyship ; 8. His release of a legacy or a distributive share of an estate. See 1 Parsons on Cont., p. 243.

4th. NECESSITY.—We have previously referred to the reasons for holding an infant's power of attorney void ; one reason is stated in 1st Am. Ldg. Cases, note, p. 254, as follows : "The constituting an "attorney, by one whose acts are in their nature "voidable, is repugnant and impossible, for it is "imparting a right which the principal does not "possess, that of doing *valid* acts : if the acts, "when done by the attorney, remain voidable, at "the option of the infant (lunatic), the power of "attorney is not operative according to its terms. "If they are binding upon the infant (lunatic), "then he has done through the agency of another,

"what he could not have done directly—binding "acts. The fundamental principle of law in re- "gard to infants (lunatics), requires that the infant "(lunatic) should have the power of affirming such "acts done by the attorney, as he chooses, and "avoiding others, at his option ; but this involves "an immediate contradiction, for to possess the "power of availing himself of any of these acts, "he must ratify the power of attorney, and if he "ratifies the power, he ratifies all that is done under "it ; if he affirms part of a transaction, he thereby "confirms the power, and thereby, against his in- "tention, affirms the entire transaction. Such "personal and legal discretionary capacity as an "infant is vested with, is, therefore, *in its nature*, "*incapable of delegation*, and the rule, that an "infant cannot make an attorney is, perhaps, not "an arbitrary or accidental exception to a principle, "but a direct logical necessity of the principle ; "but if the considerations suggested as the foun- "dation of the rule be not satisfactory, the rule it- "self is established by a conclusive weight of "authority."

There is still another reason why the power of attorney of an infant must have been held void at the common law, which has not been clearly stated in any of the decisions. It is that it would be impossible for it to be voidable—for there is *no way to avoid it.*

Every species of conveyance which passes an estate, if not valid, must be either void or voidable at law. If not actually void, there is some certain act to be done, such as entry by the heir —some plea to be pleaded, as infancy, or some certain writ known to the common law, to be sued

out, as "*dum fuit infra ætatem*," or ejectment, which avoids the voidable conveyance. There is no necessity to go into equity to set it aside. Now, suppose a power of attorney made by an infant, and no conveyance yet made under it : that power we will say is voidable, that is, it may be avoided at the common law, or may be ratified. Suppose the infant desires to avoid it, how is he do it, at law ? No estate has passed. There is no act for him to perform, no plea to plead, no writ to sue out, he cannot avoid at law, and if there is no way for him to avoid it, how is it voidable ? Then it is either void or valid. There is no way provided, for none is needed, because the act itself isvoid. For the reasons above urged, the power of attorney of a lunatic is equally void. We claim that, from principle, precedent, analogy and necessity, the power of attorney is void.

II.

If the Power and Deed were Voidable they have been Avoided.

Upon this branch of the case we adopt as our argument the words of this Court, as pronounced by Justice Story in the case of Tucker *v.* Moreland, 10 Peters, 71. The question there presented was whether the deed of an *infant* was void or voidable, and if *voidable*, whether it had been avoided—as follows :

" It is not, however, necessary for us in this case to de-
" cide whether the present deed, either from its being a
" deed of bargain and sale or from its nature, as creating a
" trust for the sale of the estate, or from the other circum-
" stances of the case, is to be deemed void or voidable only.
" For if it be voidable only, and has been avoided by the

" infant, then the same result would follow—that the " plaintiff's title is gone. Let us then proceed to the " other point. Whether, supposing the deed to Wallach " to be voidable only, it has been avoided. There is no " doubt that an infant may avoid his act, deed or contract " by different means according to the nature of the act " and the circumstances of the case. He may sometimes " avoid it by matter in pais, as in case of feoffment, by " an entry, if his entry is not tolled. Sometimes by " a plea, as when he is sued upon his bond or " other contract. Sometimes by *suit*, as when he " disaffirms a contract made for the sale of his chat- " tels and sues for his chattels. Sometimes by a writ of " audita querela, as when he has acknowledged a recogni- " zance or statute staple or merchant; (Bac. Ab. Infancy " and Age, 2 Kent, Com., § 31). Sometimes, as in case of " alienation of his estate during his nonage by a writ of en- " try, dum fuit, etc., after arriving of age. The general re- " sult seems to be that where the act of the infant is by " matter of record, he must avoid it by some act of record, " as, for instance, by a writ of error, or an audita querela " during his minority. But if the act of an infant is a " matter in pais it may be avoided by an act pais of equal " solemnity or notoriety, and this, according to some au- " thorities, either during his nonage or afterwards, and, " according to others, at all events after coming of age. " In Co. Litt., 380 b, it is said: Herein a diversity is " to be observed between matters of record done or suf- " fered by an infant and matters in fait: for matter in " fait he shall avoid either within age or at full age, as " has been said, but matters of record, as statutes " staple, or merchant, recognizances acknowledged by " him, or a fine levied by him, recovery against " him, etc., must be avoided, viz., statutes, etc., by audita " querela, fine and recovery, by writ of error during his " minority, and the like. In short, the nature of the " original act or conveyance generally governs as to the

" nature of the act required to be done in the disaffirm-
" ance of it. If the latter be of as high and solemn na-
" ture as the former, it amounts to a valid avoidance.
" We do not mean to say that in all cases the act of dis-
" affirmance should be of the same, or of as high and sol-
" emn a nature, as the original act for a *deed* may be
" *avoided by plea.* But we mean only to say that, if
" the act of disaffirmance be of as high and solemn a
" nature, there is no ground to impeach its sufficiency.
" Lord Ellenborough, in Baylis *v.* Deneby, 3 Maule &
" Selwyn, 481, held a parol confirmation of a bond
" given by an infant after he came of age, to be invalid,
" insisting that it should be by something amounting to
" an estoppel in law of as high authority as the deed
" itself—but that the same deed might be avoided by
" the plea of infancy. There are cases, however, where
" a confirmation may be good without being by deed, as
" in case of a lease by an infant and his receiving the
" rent after he comes of age. The question, then, in
" the present case, is whether the deed to Mrs. Moreland
" being of as high and solemn a nature as the original
" deed to Wallach is not a valid disaffirmance of it—we
" think it is. *If* it was a voidable conveyance which
" had passed the seisin and possession to Wallach, and
" he had remained in possession, it might, like a feoff-
" ment, have been avoided by an entry by an infant
" after he came of age. But, in point of fact, Barry
" remained in possession and, therefore, he could not
" enter upon himself. And when he conveyed to Mrs.
" Moreland, being in possession, he must be deemed to
" assert his original interest in the land and to pass it
" in the same manner as if he had entered upon the
" land and delivered the deed thereon if the same had
" been in possession The cases of Jackson *v* Carpen-
" ter, 11 John., 539; Jackson *v.* Burchin, 14 John., 124,
" are directly in point and proceed upon principles
" which are in perfect coincidence with the Common

" Law and are entirely satisfactory. Indeed, they go " further than the circumstances of the present case, for " they dispense with an entry where the possession was " out of the party when he made the second deed. In " Jackson *v.* Burchin, the Court said that it would " seem not only upon principle, but authority that the " infant can manifest his dissent in the same way and " manner by which he first assented to convey. If he " has given livery of seisin, he must do an act of equal " notoriety to disaffirm the act, he must enter on the " land and make known his dissent. If he has con- " veyed by bargain and sale, then a second deed of bar- " gain and sale will be equally solemn and notorious in " disaffirmance of the first. We know of no authority " or principle which contradicts this doctrine. It seems " founded in good sense and follows out the principle of " notoriety of disaffirmance in the case of feoffment by " an entry, etc. Upon these grounds we are of opinion " that the second deed was a complete disaffirmance and " avoidance of the prior deed To give effect to such " disaffirmance it was not necessary that the infant " should first place the other party in statu quo."

The Court, in Tucker *v.* Moreland, approved the New York rule, that no entry was necessary to avoid, rather than that of Massachusetts. See Inhabitants of Worcester *v.* Eaton, 13 Mass., 375, where it was held: " But " when title is claimed under a deed, which of itself has " executed and finished the contract, the defendant " may show in evidence the facts which authorize him to " avoid the deed. Until a deed so made is avoided, no " subsequent conveyance by the grantor can be good, be- " cause he would not be seised of the land, and none " but himself or his heirs can set up a right to avoid a " deed by infancy or duress, these being matters in de- " fence which he may waive if he see fit—so that the " title will remain good to the grantee by virtue of such

" deed until the grantor shall disaffirm it. He can do it " only by entry, but having *entered* his subsequent deed, " accompanied by proof of facts tending to avoid, the " first will convey the title."

It is singular that, while the ablest lawyers of England have been engaged for some years past in the work of legal reform, and, in carrying it out, have induced Parliament to do away with the old distinctions between feoffments and other species of conveyances, by making feoffments void like deeds of bargain and sale, the Courts of Massachusetts have, by their decisions, made deeds of bargain and sale voidable instead of void in order to put them on the same footing with feoffments. So that this relic of the feudal system, driven out of England, takes refuge in Massachusetts.

Ch. J. Gibson, of Penn., in the cases of De Silva, and Rogers *v.* Walker, shows how a deed of bargain and sale is not the equivalent of feoffment with livery of seisin, and puts the law in that State the same as Parliament has now made it in England.

As to the case of Allis *v.* Billings, 6 Metcalf, it is well to observe, that it never seemed to have occurred to the Court, that if the lunatic's deed was voidable, he had avoided it by bringing his writ of entry ; and yet, from Tucker *v.* Moreland, it is clear that such was the fact. Conceding all Justice Dewey's reasoning to have been correct, we respectfully suggest that the *judgment* may have been wrong ; but however that may be, and laying out of the question whether the later cases in Massachusetts have not overthrown the original theory (Seiver *v.* Phelps, 11 Pick, 305), those cases do not touch us. In every case cited against us, the deed held voidable, passed the estate by delivery of it. Here the power of attorney did not pass any estate by delivery of it to

Harris. Being void in his hands, it could not afterwards become operative.

If it did, we have avoided both power and deed by our action.

In some cases it has been held that the death of the ancestor determined the estate granted by the lunatic, 4 Coke, 124. In others it is assumed that entry must be made by the heir. In New York it is no longer necessary to enter upon the land, that being considered but an idle ceremony. In California there never was any necessity for entry (Soto *v.* Kroder, 19 Cal., 87), as the writ of ejectment is considered to take its place. If the bringing of the action be considered the act of avoidance, and to take the place of entry, it may be performed before or after the infant becomes of age. It is said that suing out a writ of error after an infant becomes of age is a sufficient avoidance of an act done by him ; and so would be the appearance of the defendants in this Court in response to the writ and citation. If any one of the defendants is entitled to recover, that one is entitled to the possession of every portion of the premises as against the plaintiff (Touchard *v.* Crow, 20 Cal., 150 ; Clark *v.* Huber, 20 Cal., 196).

It has been suggested that the rule of law by which the deeds and powers of attorney of lunatics are held void is a harsh rule, and impairs the rights of bona fide purchasers, who may have put valuable improvements upon the property ; that by driving every lunatic into equity, the Court would force him to do equity as a condition of canceling his deed. To this we say, that the Common Law Courts have always exercised a jurisdiction to avoid deeds ; and the books are filled with such cases. So far as the Courts of the United States are concerned, this Court may abrogate this heretofore un-

questioned branch of Common Law jurisdiction; but we presume that the entire law on this subject will not thus be overturned, except for weighty reasons. If the defendants are now, after years of ligitation, to be sent back to begin anew, on a bill in equity, how is the plaintiff to be benefited? If he has any matter of defence which he could set up to such a bill when filed by us, if those same matters were properly set forth in a bill filed by the plaintiff here, would they not be sufficient to stay the execution of our judgment at law? If he has the equities he desires the Court to believe, why has not such a bill been filed? If he has no equities which would stay the execution at law, has he any to meet the case we could present on such a bill?

Again, are we to go back to the time of Coke, and is the rule once more to be that the bona fide purchaser must be protected at the expense of the lunatic? Or is the Court to adopt the view of Lord Mansfield, that a "Court will not add to the misfortunes of those whom "God in his providence has afflicted," and therefore their acts must be held void or voidable, as shall be most for their benefit. Does the Court now propose for the benefit of the purchaser, at the expense of the lunatic, to reverse a judgment supported by all the precedents for two hundred years, in order that, in a new action in Equity, this purchaser may set up, as a partial defence, a doubtful Equity in board fence?

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New York, February 3, 1871.